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v. 2920

No. 14590

**United States
Court of Appeals**
for the Ninth Circuit

MEARL C. TILLMAN and EMILY P. TILLMAN,
Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

(And Related Cases)

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

MAY - 4 1955

PAUL B. O'BRIEN, CLERK

No. 14590

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

No. Civ. 5190

MEARL C. TILLMAN and EMILY P. TILLMAN,
Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Plaintiffs complain and allege:

I.

That at all times herein mentioned the Federal Public Housing Authority was a governmental agency created by executive order No. 9070, Feb. 24, 1942 (Title 50 USCA App. Sec. 601), by virtue of authority vested by act of Congress Dec. 18, 1941 (Public Law 354, 77th Congress, Title 50 USCA App. 601), as amended. Plaintiffs are husband and wife.

II.

This Court has jurisdiction of this action under Section 24 of the Judicial Code, 28 USCA 41 and Chapter 753, Section 410 et seq., Act of Aug. 2, 1946, 60 Stat. 843, as amended, Title 28 USC, Section 1346, known as Federal Tort Claims Act.

III.

That on or about the 18th day of January, 1918, there was created pursuant to the laws of the State of Oregon Peninsula Drainage District No. 2 con-

sisting of the area of land, lying in Multnomah County, Oregon, bounded generally as follows: On the north by Oregon Slough and Columbia River; on the east by Peninsula Drainage Canal; on the south by Columbia Slough; on the west by a levee running south from the intersection of Union Avenue and Denver Avenue to the point of intersection of Denver Avenue and Columbia Slough; as first constructed this west levee had an elevation of 28 feet and was sixty feet in width at the top; and prior to 1942 was raised to an elevation of approximately 35 feet; this said levee was also used for highway purposes, such highway being known as Denver Avenue and/or U. S. Highway 99 W; that said highway was also a highway of the State of Oregon.

IV.

That at all times mentioned herein the plaintiffs were the owners of certain real property lying within the boundaries of the said Peninsula Drainage District No. 2 consisting of approximately $\frac{3}{4}$ ths of an acre of land, known as 819 N. Marine Drive, Portland, Multnomah County, Oregon; said property was improved by a frame dwelling house and chicken house, and upon which property was furniture, furnishings, equipment, tools, clothing, personal effects and other personal property, and which said premises were occupied by the plaintiffs as their home.

V.

That the Columbia River drains a vast area of land and carries a tremendous volume of water frequently cresting at flood stage at elevation in

excess of 25 feet. That the plaintiffs relied on the protection and security of the levees bordering and enclosing Peninsula Drainage District No. 2 in which their above-described property is located and in reliance thereon maintained their home thereon and made the valuable improvements mentioned.

VI.

That in November, 1942, the Federal Public Housing Authority, while acting as an agency or instrumentality of the United States of America, in order to have easy access to a housing project then and for some time thereafter maintained by it, lying on either side of Denver Avenue, wrongfully and tortiously cut and severed the said levee on which Denver Avenue is located, and excavated and removed hundreds of yards of dirt and gravel constituting the levee, and thereafter built and established a bridge continuing Denver Avenue over such breach and excavation, and an access road or highway under the level of Denver Avenue to the site of the housing project; that the effect of this excavation and severance of the levee was to entirely destroy its usefulness in the purpose for which it was constructed, namely, to protect the lands and property of these plaintiffs and others situate in District No. 2, from the flood waters of the Columbia River or its tributaries. That the said Federal Public Housing Authority and the U. S. Army Corps of Engineers, are agencies and instrumentalities of the United States of America, and both agencies maintained said breach and the bridge constructed over it on Denver Avenue and the access road thereunder continuously from November, 1942, until

May, 1948, and at no time during such period did the defendant install, construct or maintain any adequate or reasonable levee or barrier to render said Denver Avenue fill or levee again suitable for the purpose that it was used and intended, namely, to protect the lands and property lying within the boundaries of Peninsula Drainage District No. 2, including the lands and property of the plaintiffs against the flood waters of the Columbia River and its tributaries.

VII.

That in May, 1948, the level of the Columbia River rose to flood stage reaching an elevation on May 30, 1948, of approximately 30 feet. That on said date the lands lying in Peninsula Drainage District No. 1, immediately west of and adjacent to Peninsula Drainage District No. 2, and using Denver Avenue levee as a common boundary, became flooded, and water poured into and against the Denver Avenue levee.

VIII.

That because of the wrongful and tortious act of the Federal Public Housing Authority and the U. S. Army Corps of Engineers, as agents and instrumentalities of the defendant, in cutting, severing and removing a portion of said Denver Avenue levee, and continuing such severance, removal and breach, the levee was rendered useless as a protection against the flood waters, and the entire area of District No. 2, including the lands, structures, improvements, furniture, furnishings, equipment and other personal property of the plaintiffs became flooded with water; that as a direct and proximate result of the

wrongful and tortious act of the defendant and the flooding of the plaintiffs' premises, furniture and furnishings, heating equipment and machinery, and clothing of the plaintiffs of the value of \$4,987.45, was swept away and destroyed and the plaintiffs have thereby sustained damages in the amount of \$4,987.45; that prior to the flooding of the plaintiffs' premises, as hereinbefore set forth, the plaintiffs' land, residence and improvements were of the value of \$4,500.00, and as a direct and proximate result of the wrongful and tortious act of the defendant, said land, and the improvements thereon, was depreciated in the amount of \$2,000.00; that the plaintiffs have suffered full damages in the amount of \$6,987.45;

IX.

That the plaintiffs have presented no claim against the defendant or any of its agencies or employees on account of any of the matters or things herein alleged.

X.

That the plaintiffs have agreed to pay their attorneys herein a sum equal to 20 per cent of the amount recovered, as provided by law; that such a sum is a reasonable fee to be paid for such services.

Wherefore, these plaintiffs pray for a judgment against the defendant for the sum of \$6,987.45, together with plaintiffs' costs and disbursements herein incurred, said judgment to provide that 20 per cent of the amount of recovery shall be paid to plaintiffs' attorneys herein.

Dated this 15th day of December, 1949.

W. K. PHILLIPS, and

WM. C. RALSTON,

/s/ CLIFFORD G. SCHNEIDER,

Attorneys for Plaintiffs.

[Endorsed]: Filed December 15, 1949.

[Title of District Court and Cause.]

ANSWER OF THE UNITED STATES

Comes now defendant, the United States of America, and for its answer to the complaint alleges:

First Defense

1. The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

2. The Court has no jurisdiction of this action under the Federal Tort Claims Act or otherwise.

Third Defense

3. The acts of alleged negligence described in the complaint all took place prior to the enactment of the Federal Tort Claims Act and therefore such acts of alleged negligence are not actionable under that statute or at all.

Fourth Defense

4. Section 702c of Title 33 of the United States Code specifically provides that defendant shall not be liable for or held responsible for damage caused by floods or flood waters.

Fifth Defense

5. All damage, loss or injury described in the complaint was caused, if at all, by an exceptionally severe flood of the Columbia River and its tributaries over which the agency of man had no control and all such damage, loss or injury, if any, is the result of an act of God for which neither defendant nor its agencies or employees are in any way responsible.

Sixth Defense

6. The Court has no jurisdiction of this action and no claim is stated against defendant for the reason that all claims set forth in the complaint in so far as they are based upon an act or omission of an agency or employee of defendant, either while acting within the scope of its or his office or employment or otherwise, are based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty for which defendant has not consented to be sued under the provisions of the Federal Tort Claims Act or at all.

Seventh Defense

7. Defendant and all its agencies and employees exercised due care in all matters referred to in the complaint.

Eighth Defense

8. Plaintiff(s) by residing in, owning or possessing property located within Peninsula Drainage District No. 2 assumed all risk of loss of, damage to or destruction of the property described in the complaint by reason of the failure of any embankment

surrounding the Drainage District. If and to the extent that plaintiff(s) acquired or improved any property in Peninsula Drainage District No. 2 after the alleged acts of negligence or wrongful conduct referred to in the complaint, plaintiff(s) assumed all risk of loss on account of such alleged negligence or wrongful conduct and waived all right to complain thereof.

Ninth Defense

9. Defendant denies each allegation of negligence or wrongful conduct set forth in the complaint and alleges that if plaintiff(s) suffered any damage, loss or injury on account of any negligence or wrongful conduct, the negligence or wrongful conduct which caused such damage, loss or injury was the negligence of plaintiff(s) in residing in, owning or possessing property located within Peninsula Drainage District No. 2 and in failing to take such steps as might be appropriate, by or through said Drainage District or otherwise, to provide adequate protection to their property, and in further failing to remove their property from said Drainage District prior to or during the high water period of May, 1948.

Tenth Defense

10. No act or failure to act of defendant or any agency or employee of defendant was the proximate cause of any damage, loss or injury to plaintiff(s).

Eleventh Defense

11. Defendant denies each allegation of the complaint except that defendant admits and alleges as follows: At all times mentioned in the complaint

the Federal Public Housing Authority (a constituent unit of National Housing Agency and created by Executive Order 9070 dated February 24, 1942) was an agency of the United States. At all such times the Corps of Engineers, Department of the Army, was an agency of the United States. On or about September 15, 1917, there was created pursuant to the laws of the State of Oregon, a drainage district known as Peninsula Drainage District No. 2, the boundaries of which were approximately as described in the complaint. Peninsula Drainage District No. 2 was separated from Peninsula Drainage District No. 1, the drainage district immediately to the west, by a highway fill supporting Denver Avenue. At all times mentioned in the complaint this fill was owned by the State of Oregon and controlled by the Oregon State Highway Department.

In late 1942 or early 1943, upon the advice and with the consent of the Oregon State Highway Commission, an underpass was built under Denver Avenue at a location where Denver Avenue separates the two drainage districts and shortly thereafter a semicircular embankment was constructed to surround the opening made in the Denver Avenue fill. Neither the United States nor any agency or employee of the United States constructed or at any time maintained the underpass beneath Denver Avenue nor the embankment surrounding that underpass.

In May, 1948, the Columbia River was in flood. On May 30, 1948, the western embankment of Penin-

sula Drainage District No. 1 failed and that district was flooded. In the evening of May 31, 1948, the ring embankment at the Denver Avenue underpass failed and Peninsula Drainage District No. 2 was flooded between Denver Avenue and Union Avenue. Later that night and on June 1, 1948, the embankment supporting Union Avenue also failed and the balance of the Drainage District was flooded.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the complaint which relate to the occupancy of property by plaintiff(s), to the ownership of property by plaintiff(s), to damage, loss or injury to or destruction of property, or to the employment of attorneys by plaintiff(s) and on that ground defendant denies each such allegation.

Wherefore, defendant prays:

1. That plaintiff(s) take nothing by this action;
2. That the Court award to defendant its costs in this action and such further relief as to the Court may seem proper.

/s/ HENRY L. HESS,

United States Attorney;

/s/ JOHN R. BROOKE,

Ass't. United States Attorney;

/s/ WALKER LOWRY,

Special Ass't. to the Attorney
General.

Service of Copy acknowledged.

[Endorsed]: Filed November 23, 1951.

[Title of District Court and Cause.]

Pre-Trial Order

A pre-trial conference was held in this and related cases on the 4th day of August, 1953, the Honorable James Alger Fee presiding. Plaintiffs appeared by their attorney, William C. Ralston. The United States appeared by its attorneys, Henry L. Hess, United States Attorney, and Walker Lowry, Special Assistant to the Attorney General.

Now, Therefore:

A. The parties have agreed and it is hereby ordered that the cases listed in Schedule A attached to this order shall be and they are hereby consolidated with this case. The consolidated cases all relate to claims for property damage at Peninsula Drainage District No. 2, Multnomah County, Oregon, arising out of the 1948 Columbia River Flood.

B. The parties have agreed and it is hereby ordered that the trial and determination of the amount, if any, of the damage suffered by the plaintiffs in the consolidated cases shall be postponed until there has been a trial court determination of whether or not the United States is liable to the plaintiffs for their damage if any.

C. For the purposes of the decision and disposition of these consolidated cases, but for no other purpose, the parties agree as follows:

Agreed Facts

1. The Columbia River.

The Columbia River has its source in Columbia Lake, British Columbia, 75 miles north of the international boundary. From its source the river flows northwesterly for a distance of 200 miles; it then turns and flows almost due south a distance of 260 miles to enter the United States near the northeast border of the State of Washington. From the international boundary to a point 15 miles below the mouth of the Snake River, a distance of 441 miles, the river flows in a southerly direction through the eastern part of the State of Washington; it then turns and flows westward a distance of 309 miles, forming a boundary between Oregon and Washington, to discharge into the Pacific Ocean at a point 160 miles south of the Straits of Juan de Fuca and 610 miles north of San Francisco Bay. The river has a total length of 1,210 miles, of which 750 miles are in the United States. The southern limits of its basin are in Nevada and the eastern boundary of the basin is the continental divide. The Columbia, with its tributaries, drains parts of seven states and a large part of British Columbia. The total area of the basin is approximately 259,000 square miles.

The maximum discharge of the Columbia River customarily occurs in early summer, usually in June. It results principally from the melting of snow in the Rocky Mountains and contiguous ranges from Yellowstone Park, Wyoming, on the south to

Mt. Robson Park, British Columbia, on the north. In the period from 1858 to 1947, there have been four occasions on which the flow of the river at The Dalles has exceeded 900,000 feet per second: In 1862, 1876, 1880 and 1894. From the mouth of the Snake to and through the Cascade Range, the river in general flows through a narrow valley or gorge. From the head of tidal waters near Bonneville to the sea, a distance of 142 miles, the bottom land areas vary in width from a few hundred feet to about six miles.

The Corps of Engineers of the United States Army has made the following formal reports relating to flood control and bank protection on the Columbia River: A report dated 1918 entitled "Carrolls to Stella, Washington"; a report dated 1926 entitled "Martin Bluff to Lewis River, Washington"; a report dated 1928 entitled "Bank Protection Between Ilwaco and Chinook, Washington"; a report dated 1931 entitled "Protection of Banks and Dikes to Prevent Shoaling by Erosion"; a report dated 1931 entitled "Columbia River and Tributaries"; a report dated 1935 entitled "Flood Control Report"; a report dated 1936 entitled "Columbia River and Tributaries"; and a report dated 1937 entitled "Preliminary Examination for Flood Control of Columbia River."

2. Site of Peninsula Drainage District No. 2.

Peninsula Drainage District No. 2 is situated in Multnomah County, Oregon. It lies approximately 107 miles above the mouth of the Columbia River

and approximately 5 miles above the confluence of the Columbia and Willamette Rivers. The general boundaries of Peninsula Drainage District No. 2 are: On the north, the Columbia River; on the east, an excavated channel known as the City Cut, which connects the Columbia River and Columbia Slough; on the south, Columbia Slough; and on the west, the highway fill supporting Denver Avenue. Denver Avenue marks the boundary between Peninsula Drainage District No. 2 and Peninsula Drainage District No. 1. During periods of high water in the Columbia River, water surrounds Peninsula Drainage District No. 2 on the north, east and south. The water on the east and south is backwater which carries no perceptible current.

Unless otherwise noted, the situation described in this agreed statement of facts existed during May and early June, 1948, and particularly on May 30, May 31 and June 1, 1948.

3. Elevation of Peninsula Drainage District No. 2.

The total area within Peninsula Drainage District No. 2 is approximately 1,425 acres. This area varies in elevation from 0 to 22 feet m.s.l., with most of the area below 15 feet m.s.l., and hence below average flood height in the Columbia River. In the absence of protecting embankments most of the area of the district would be inundated during periods of normal river flow but during periods of very low flow a substantial part of the area would be dry.

All references in this agreed statement of facts to

mean sea level are to mean sea level as fixed by the 1929 adjustment.

4. Drainage of Peninsula Drainage District No. 2.

The natural drainage of Peninsula Drainage District No. 2 is from east to west and from north to south. Drainage water is collected in sloughs and shallow ditches which converge on a pumping station located near the Columbia Slough levee in the southwesterly portion of the district. This is the main pumping station within the district and there is no way for drainage water to be removed from the district except through this station. The two pumps at the station transfer drainage water from the district to Columbia Slough. They have a total rated capacity of from 20,000 to 37,500 g.p.m. depending on the existing head.

5. Levee Work by Peninsula Drainage District No. 2.

Peninsula Drainage District No. 2 was organized on September 25, 1917, under the drainage district laws of the State of Oregon, and has ever since continued in existence. In June, 1917, the area west and immediately adjacent to Peninsula Drainage District No. 2 was organized as a drainage district known as Peninsula Drainage District No. 1. The highway fill supporting Denver Avenue was in existence in 1917, and that highway became the boundary between the two districts. During the period from 1917 to 1921, Peninsula Drainage District No. 2 built levees on the north, south and east. This levee

work was done by bucket and suction dredges. The materials to build the levees were taken from the Columbia River, from the city drainage canal and from Columbia Slough.

The district constructed the north levee to a minimum elevation of approximately 33 feet m.s.l., with a crown width averaging from 8 to 30 feet, and slopes of approximately 1 on 2 (one foot of vertical distance for every two feet of horizontal distance) and 1 on 3, to give a base width at the inside average ground level of from 60 to 100 feet or more. This north levee, together with the high ground which formed a portion of it, extended for approximately 10,384 feet eastward from Denver Avenue to the right bank of the city drainage canal. The levee was constructed by hydraulic methods. It was built of sand dredged from Columbia River and pumped to the site of the levee. The work was completed in 1921. That portion of the south levee between Denver Avenue and Union Avenue was built by Peninsula Drainage District No. 2 in 1917. Sandy silt was borrowed from Columbia Slough and installed at the levee site by bucket dredges. This levee section, approximately 6,500 feet in length, was constructed to a minimum elevation of approximately 33 feet m.s.l., with a crown width averaging from 8 to 10 feet and slopes of approximately 1 on 2, and 1 on 3, to give a base width at the inside average ground level of from 60 to 80 feet or more. The east levee of the district and that portion of the southern levee

east of Union Avenue were completed by Peninsula Drainage District No. 2 in 1921. These levees were constructed of sandy silt borrowed from Columbia Slough and the city canal and installed at the levee site by bucket dredges. The levees were constructed to the same dimensions as that portion of the south levee between Denver Avenue and Union Avenue.

The levees thus constructed by Peninsula Drainage District No. 2 were intended to provide protection against a flood in the Columbia River equal to the 1876 flood, the second highest then of record. The total cost to the district of constructing the levees was \$131,767.61. Peninsula Drainage District No. 2 has no source of income other than assessments against the land included in the district. Funds to pay the cost of the levees were obtained in the first instance by bond issues. The bonds were redeemed by annual assessments against the district lands. The district now has and ever since its organization has had power to arrange for such assessments to provide funds for the construction or maintenance of levees which protect the district.

6. Levee Work by the Corps of Engineers.

In 1934 it was suggested to Congress that Federal funds should be expended to give additional flood protection to various areas within the Columbia River Basin, including Peninsula Drainage District No. 2. By an Act entitled "An Act to provide a preliminary examination of Columbia River and its tributaries in the State of Washington with a view

to control of its flood waters," approved June 13, 1934 (Public Law No. 339, 73rd Congress), Congress authorized the Secretary of War to make a preliminary survey of the Columbia River and its tributaries and make a recommendation to Congress as to the desirability of expending Federal funds for flood control purposes. Pursuant to this authorization the Corps of Engineers prepared a report recommending, among other things, that the front and back levees of Peninsula Drainage District No. 2 be raised and strengthened. The Corps of Engineers found that at some points these levees had settled to the extent that the top of the levee was at or only slightly above the 1876 flood plane. By Section 5 of the Flood Control Act of 1936, 49 Stat. 1590, Congress authorized the War Department, under direction of the Secretary of War and supervision of the Chief of Engineers, to proceed with the work recommended by the Corps at an estimated cost of \$287,200 and with the local cooperation specified in the 1936 Act. The Peninsula Drainage District No. 2 project as thus proposed and approved provided for the restoration of the levees to provide a 3-foot free-board above the level of a flood of the 1876 magnitude.

The work on the north levee consisted of the construction of approximately 956 feet of river-front concrete wall and the reconstruction of approximately 3,181 feet of earth levee and appurtenant work. The work on the south levee consisted of the reconstruction of approximately 2.20 miles of earth

levee. The work on the east levee consisted of the reconstruction of 1.32 miles of earth levee. The Peninsula Drainage District No. 2 levees as thus reconstructed were built to a mean sea level elevation of from 33.0 to 35.0 feet. The crown width of the north levee was 12 feet in the reconstructed section where the levee carried no road and from 20 to 30 feet in that portion of the levee where the levee carried a road. The crown width of the south levee as reconstructed was 12 feet. The riverward slopes of the north levee were not reconstructed except where revetments were placed. There the slopes were 1 on 2. The landward slopes of the north levee were constructed 1 on 3. On sections not reconstructed the slopes ranged from 1 on 2 to 1 on 4 to give an approximate width at the inside average ground level of 90 to 100 feet or more. Between Denver and Union Avenues the slopes of the south levee were 1 on 2 to give an approximate width at the inside average ground level of 70 feet or more. East of Union Avenue the landward slope of the south levee was made 1 on 3 to give a base width of 100 feet or more. The east levee had a riverward slope of 1 on 2 and a landward slope of 1 on 3 to give an approximate width at the inside average ground level of 100 feet or more. The east levee had a crown width of 12 feet. The north, south and east levees were all reconstructed from material taken from borrow pits outside of Peninsula Drainage District No. 2. This material was predominantly silt and clay. It was placed in the levee by draglines, trucks and carryalls. The construction work was

done by private contractors according to plans and specifications provided by the Corps of Engineers. The work of the Corps of Engineers on the levees was completed in 1940. Control of the levees was formally surrendered to Peninsula Drainage District No. 2 by sections as they were completed and the final release was made on August 2, 1944. The United States does not own and it has never owned the land upon which the levees are built. Subject to such contentions as may hereinafter be made with respect to the high water period of 1948, at no time subsequent to the time the levees were surrendered to Peninsula Drainage District No. 2 have these levees been controlled or maintained by the United States or by any agency or employee of the United States.

7. The Western Embankment at Peninsula Drainage District No. 2.

The western boundary of Peninsula Drainage District No. 2 is the highway fill which supports Denver Avenue. This fill was constructed in 1915 and 1916 by Multnomah County, Oregon, at the expense of the Interstate Bridge Commission, as one of the approaches to the interstate bridge which crosses the Columbia River from Oregon to Washington. The fill was constructed by hydraulic methods. A suction dredge pumped sand from Oregon Slough to the site of the fill. The fill was built at an elevation of approximately 37.6 feet m.s.l., with a crown width of approximately 92 feet (of which 56 feet were paved) and slopes of approximately 1 on 3 to give a width

at average ground level of 317.6 feet or more. This fill was built over a right-of-way conveyed to Multnomah County by the Peninsula Industrial Company under date of March 16, 1915. The deed was recorded in Book 687, Page 39 of the Multnomah County Deed Records. This deed conveyed a strip of ground 80 feet in width, but gave the County additional rights, including the right to place the toe of the slopes of any embankments on the adjoining real property belonging to the grantor together with the right to waste earth upon the said land whenever necessary by reason of any fill or other structure placed by said Multnomah County on the land conveyed, but provided further that nothing therein contained should be construed to convey any interests in the land of the grantor other than the 80 feet wide strip of land conveyed.

This deed contained the following condition:

“Provided, However, and this conveyance is made upon the following express conditions which are hereby declared and agreed to be conditions subsequent.

“(a) That the said Multnomah County shall within three (3) years from the date of this conveyance construct or cause to be constructed and thereafter maintained upon that part of the tract of land herein described as Parcel B, which is north of the north bank of Columbia Slough, a fill and embankment which shall as far as possible duplicate the fill and embankment to be constructed by said Multno-

mah County upon Parcel A as described herein, the west side line of the crown of said fill or embankment to coincide substantially with the west side line of said Parcel B and shall within said period provide and thereafter maintain a public highway over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereover and if sufficient funds shall be available out of the proceeds of the so-called interstate bridge bonds of Multnomah County to pave said highway in substantially the same manner as the highway to be constructed over the said Parcel A herein described shall be paved then and within said period above prescribed said Multnomah County shall likewise pave the said highway to be constructed over the said Parcel B as herein described which pavement shall thereafter be maintained in the manner provided by law."

This deed also contained among other things the following reservation to the grantor and its successors in title:

"(e) The right to construct and maintain on any portion of the said two parcels hereby conveyed not occupied or at any time required or to be required by the roadway or roadways at any time to be constructed thereon by Multnomah County, such fills, embankments and roadways as the grantor or its successors shall determine and with the right in the said grantor, its successors or assigns, to occupy and use the same, which said fills, embankments and roadways may be supported in whole or in part by

any fill, embankment or structure constructed or maintained on either of said parcels by Multnomah County.”

On or about June 1, 1917, Peninsula Drainage District No. 1 was organized and adopted Denver Avenue, then known as Derby Street, as its eastern boundary. At that time there was no protection for this district from waters from the east except the Denver Avenue or Derby Street fill. On September 25, 1917, Peninsula District No. 2 was organized and adopted Denver Avenue as its western boundary. The two districts placed a culvert approximately 5 x 5 through the Denver Avenue fill and adopted a common drainage system so that the waters would drain from District No. 2 through the drainage culvert to District No. 1 and there be pumped by a mutually owned pumping plant into Columbia Slough.

On December 31, 1926, a correction deed of the right-of-way was given by Peninsula Industrial Company to Multnomah County after the fill had been completed. This deed was given for the purpose of correcting the description of the prior deed, the fill having been built off of the original description. This deed also limited the area conveyed to a strip 80 feet in width and repeated and confirmed the restrictions and reservations in the prior deed. This deed is recorded in Book 182, Page 298 of the Multnomah County Deed Records.

Under date of March 26, 1928, the Board of Commissioners of Peninsula Drainage District No. 2

filed a petition for amendment of the plan of reclamation. Paragraph II of the petition reads as follows:

“The plan for reclamation heretofore adopted by and for said Peninsula Drainage District Number Two, provided for the construction of dikes and levees surrounding the District to an elevation of twenty-eight feet, and said dikes and levees have been constructed and completed in accordance with said plan for reclamation. The Derby Street approach to the Interstate Bridge, by which Peninsula Drainage District Number Two is now bounded and enclosed on the west, was constructed by the County of Multnomah to an elevation of thirty-three feet at the crown. The dikes and levees constructed by and enclosing Multnomah Drainage District Number One of Multnomah County, Oregon, situated immediately to the east of Peninsula Drainage District Number Two, are all constructed to an elevation of thirty-two feet at the top. Your petitioners have been informed by the engineer for Peninsula Drainage District Number Two that the dikes and levees enclosing said Peninsula Drainage District Number Two should all be constructed to an elevation of thirty-three feet; and various land owners in said District have made application to your petitioners as the Board of Supervisors of said District, to make provision for the construction of said dikes and levees to an elevation of thirty-three feet.”

On May 19, 1928, an order was made by the Hon. Judge Tazwell, Judge of the Circuit Court, Probate Department for Multnomah County, confirming and approving the amended plan. The Court then appointed three (3) supervisors with authority to proceed to carry out the construction work provided by such plan and appointed three (3) commissioners to assess the benefits and damages to the property within the district. On August 22, 1928, the commissioners so appointed by the Court filed their report on which they found that no lands within the district would be damaged and all of them would be benefited equally and assessed the same at Twenty-five and no/100 (\$25.00) Dollars per acre to cover the cost of this amended plan of improvement. Following improvements made to the levees under this reorganization plan, ending in the early 1930's, Districts Nos. 1 and 2 separated their drainage system. The culvert under Denver Avenue was plugged and Drainage District No. 2 drained its surplus waters to its south dike along the Columbia Slough, put in its own pumping plant and from that time on pumped its drainage waters over the dike into the Columbia Slough.

The Interstate Bridge Commission transferred control of the Denver Avenue approach to the interstate Bridge to Multnomah County on January 1, 1929. On March 26, 1937, the Oregon State Highway Commission took over control of Denver Avenue by resolution of the State Highway Commission and on that date Denver Avenue became an Oregon

State highway. Since then, Denver Avenue has been owned by the State of Oregon and controlled by the Oregon State Highway Department. Denver Avenue has been in regular use as a public highway since it was first constructed in 1915 or 1916. Neither the land on which said highway is located nor the fill itself, except that portion which rests upon private property and has been acquired by the United States as an adjoining owner, has ever belonged to the United States and (subject to such contentions as may hereafter be made with respect to the high water period of May, 1948) at no time has the fill ever been maintained or controlled by the United States or by any agency or employee of the United States.

In the latter part of 1943 or early in 1944, the Oregon State Highway Commission constructed a traffic interchange at the intersection of Denver Avenue and Union Avenue, filling in and utilizing the high ground from Denver Avenue to North Portland Road and from Union Avenue to North Portland Road in such a way that a levee and high ground to an elevation of approximately 31 feet separated Drainage Districts No. 1 and No. 2, and the protection, if any, afforded by the Denver Avenue fill was not affected except by a lowered elevation of approximately four feet.

In connection with the construction of this traffic interchange an underpass was constructed beneath Union Avenue which was not protected by stop logs or any other flood protection structure. The work

on this underpass by the Oregon State Highway Commission was completed March 23, 1944.

In 1944, the Oregon State Highway Commission constructed an underpass at the intersection of Denver Avenue and Columbia Slough, permitting traffic under Denver Avenue on Schmeer Road, and also built an access road at the same location, permitting traffic to continue north on Denver Avenue from Schmeer Road. At the time this underpass and access road were constructed, the levees of Peninsula Drainage Districts Nos. 1 and 2 were already in existence. The underpass was located on the north bank of Columbia Slough. In connection with the construction of the underpass, which was located south of the south levee of Peninsula Drainage District No. 1, the western end of the south levee of Peninsula Drainage District No. 2 was relocated slightly to the north of its former location. The underpass and access road on the east of the Denver Avenue fill were so constructed that the elevation of Denver Avenue was not affected and the serviceability, if any, of the Denver Avenue fill as a levee and protection against flood waters occurring in either Drainage District No. 1 or Drainage District No. 2 was not impaired. The work by the Oregon State Highway Commission in connection with the underpass was completed July 25, 1945.

8. The Levees of Peninsula Drainage District No. 1.

West of the highway fill supporting Denver Avenue lies Peninsula Drainage District No. 1. The levees of that district provide protection for Penin-

sula Drainage District No. 2 in the sense that in the absence of a failure of one or more of those levees, flood waters can not approach Peninsula Drainage District No. 2 from the west. The levees of Peninsula Drainage District No. 1 are described below.

- a. The north and south embankments: Levee work by Peninsula Drainage District No. 1.

Peninsula Drainage District No. 1 was organized on June 1, 1917, under the drainage district laws of the State of Oregon, and has ever since continued in existence. In 1917, when the district was organized, the railway fills along the west side of the district were or were about to be constructed and those fills were then the only protective embankments for the district on the westerly side. The Denver Avenue fill was in existence in 1917, and that fill became the only protective embankment for the district on the easterly side. The Drainage District undertook the work of providing protection on the north and south sides. The north levee was originally located partly adjacent to and partly immediately behind (south of) the high ground paralleling Oregon Slough. This levee was constructed by hydraulic methods. Sand was dredged from Oregon Slough and pumped to the site of the levee. The levee was constructed to a minimum elevation of approximately 30 feet m.s.l., with a crown width averaging 10 to 12 feet and slopes of approximately 1 on 5 (one foot of vertical elevation for every 5 feet of horizontal distance) to give a base width at the inside average ground level of 50 feet or more.

The levee together with the high ground which formed a part of it extended for approximately 7,000 feet from Denver Avenue on the east to the railroad fills on the west. The levee work was completed by 1918.

The south levee was located along the right bank of and parallel to Columbia Slough. This levee was also completed by 1918. Material was borrowed from the Columbia Slough area and hoisted to the site of the levee. The levee was constructed to a minimum elevation of approximately 30 feet m.s.l., with a crown width averaging 8 feet and slopes of approximately 1 on 3 to give a base width at the inside average ground level of 70 feet or more. The levee was approximately 7,500 feet long. The levees thus constructed by Drainage District No. 1 were intended to provide protection against a flood in the Columbia River equal to the 1876 flood, the second highest on record at that time.

The total cost to the Drainage District of constructing these levees was \$21,376.64. Peninsula Drainage District No. 1 has no source of funds other than assessments against the land included in the district. Funds to pay the cost of the levees were obtained in the first instance by the sale of bonds to Peninsula Industrial Company, one of the Swift companies. Funds to redeem the bonds were obtained by annual assessments against the land within the district at the rate of \$7.00 per acre. The district now has and ever since its organization has had power to arrange for such assessments to provide

funds for the construction or maintenance of levees which protect the district.

In 1935 the Corps of Engineers, at the direction of Congress, investigated and reported to Congress on the condition of levees along the Columbia River, including those constructed by Peninsula Drainage District No. 1. They had then settled to such an extent that in some places the top of the levee was from 0.5 to 1.5 feet below the 1876 flood plane. In the judgment of the Engineers they were also of insufficient section to provide the protection for which they were intended.

b. The north and south embankments: Levee work by the Corps of Engineers.

In 1934 it was suggested to Congress that Federal funds should be expended to give additional flood protection to various areas within the Columbia River basin, including Peninsula Drainage District No. 1. By an Act entitled "An Act to Provide a Preliminary Examination of Columbia River and its Tributaries in the State of Washington, with a View to the Control of Its Flood Waters" approved June 13, 1934 (Public Law No. 339, 73rd Congress), Congress authorized the Secretary of War to make a preliminary survey of the Columbia River and its tributaries and make a recommendation to Congress as to the desirability of expending Federal funds for flood control purposes. Pursuant to this authorization, the Corps of Engineers prepared a report recommending, among other things, that the

north and south levees of Peninsula Drainage District No. 1 be raised and strengthened. By Section 5 of the Flood Control Act of 1936 (49 Stat. 1590) Congress authorized the War Department, under direction of the Secretary of War and supervision of the Chief of Engineers, to proceed with this work at an estimated cost of \$133,300 and with the local cooperation specified in the Act. The Peninsula Drainage District No. 1 project as thus proposed and approved did not include protection for the industrial plants situated on the northerly strip of high ground paralleling Oregon Slough. This was for the reason that the north levee as constructed by Peninsula Drainage District No. 1 was partly behind rather than in front of this high ground. In order to provide protection to the high ground and the industrial plants located upon it, the project for Peninsula Drainage District No. 1 was amended and a project report revised accordingly and dated April 25, 1940, was approved by the Chief of Engineers and by Peninsula Drainage District No. 1.

The flood protection structures for Peninsula Drainage District No. 1 authorized by Congress and the work undertaken by the Corps of Engineers and approved by Peninsula Drainage District No. 1 was confined entirely to the north and south levees of the district. The work done on the north consisted of the construction of approximately 0.45 miles of river front concrete wall and approximately 0.74 miles of earth levee and appurtenant work. The work done on the south consisted of the reconstruc-

tion of approximately 1.4 miles of earth levee, thereby raising the existing levee from 3 to 6 feet. These levees were constructed to a mean sea level elevation of from 34.7 to 34.9 feet. The crown width of the north levee varied from 6 to 12 feet. The crown width of the south levee was 12 feet and it was approximately 25 feet above average ground level on the landward side. The riverward and landward slopes of the north levee ranged between 1 on $1\frac{1}{2}$ to 1 on 3 to give an approximate width at the inside average ground level of 44 feet or more. The south levee had a riverward slope of 1 on $2\frac{1}{2}$ and a landward slope of 1 on 3 to give an approximate width at the inside average ground level of 150 feet or more. The levees were reconstructed from material taken from borrow pits within Peninsula Drainage District No. 1. This material was predominantly silt and clay. It was hauled to the levee sites by trucks or carryalls. The construction work was done by private contractors according to plans and specifications established by the Corps of Engineers.

The work of the Corps of Engineers on the levees was completed in 1941. Control of the levees was formally surrendered to Peninsula Drainage District No. 1 on September 15, 1941. Subject to the rights, if any, which the United States acquired by virtue of the condemnation proceeding begun on November 4, 1942, in the District Court of the District of Oregon, Civil No. 1604, neither the land on which these levees are situated nor the levees them-

selves belong to or have ever belonged to the United States. Subject to such contentions as may hereinafter be made with respect to the high water period of May, 1948, at no time subsequent to September 15, 1941, have these levees been controlled or maintained by the United States or any agency or employee of the United States.

c. The western embankment: The Union Pacific fill.

Between Peninsula Drainage District No. 1 and lands on the west subject to flood are located the railroad fill of the Spokane, Portland & Seattle Railway Company, the railroad fill leased by Union Pacific Railroad Company from Oregon-Washington Railroad & Navigation Company and the highway fill supporting North Portland Road. The Union Pacific fill extends northerly from Columbia Slough levee a distance of approximately 3,200 feet to where it joins the fill of the Spokane, Portland & Seattle Railway Company. Between this point of junction and the Columbia Slough levee flood waters can bypass the S. P. & S. Ry. Co. fill and hence in this area, the Union Pacific fill alone prevents flood waters from reaching Peninsula Drainage District No. 1. North of the point of junction a single structure consisting of the combined railroad fills and the highway fill supporting North Portland Road is between the District and lands on the west subject to flood. It is this structure north of the point of junction which failed on May 30, 1948.

The Union Pacific fill south of the point of junction with the Spokane, Portland & Seattle Railway

Company fill has a crown width of approximately 24 feet, an average height of approximately 30 feet above average inside ground level and slopes of approximately 1 on $1\frac{3}{4}$ to give the fill an average ground level width of 130 feet or more. This southerly fill was constructed between July, 1909, and April, 1911, by the Oregon & Washington Railroad Company, the predecessor in interest of the Oregon-Washington Railroad & Navigation Company from whom the Union Pacific Railroad Company leases the fill and the tracks which it carries. Prior to the construction of the fill, which began in 1909, the tracks of the railroad were carried over the same site by a trestle. This trestle was constructed between February and September, 1908. The present fill was created by dumping material down through and over the trestle. The stringers of the trestle were removed but the piling was not. According to the best available information the material used to make the fill came from the portal area of the Peninsula tunnel. It was predominantly a sandy loam with some clay content.

North of the point of junction of the Union Pacific Railroad Company fill with the Spokane, Portland & Seattle Railway Company fill, the combined fill continues for a distance of about 1,000 feet. At this point a fill supporting tracks of Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company (as lessee), and Peninsula Terminal Company, begins to turn eastward toward the industrial plants located on the high ground which

constitutes the northerly portion of Peninsula Drainage District No. 1. The Spokane, Portland & Seattle Railway Company fill continues in a northerly direction to Oregon Slough.

According to best information now available that portion of the fill supporting the Union Pacific track which constitutes a single structure with the fill of the Spokane, Portland & Seattle Railway Company (and which includes the portion through which flood waters passed on May 30, 1948), was constructed some time between 1910 and 1918 by the same method which was used to construct the southern portion of the Union Pacific fill. The fill was built by dumping material of a sandy nature over and through an existing trestle. The trestle stringers were removed but the piling was not. This fill rests on land belonging in undivided interests to the Spokane, Portland & Seattle Railway Company and the Northern Pacific Railway Company. Subject to such contentions as may hereinafter be made with respect to the high water period of May, 1948, the fill is and always has been owned, maintained and controlled by one or more of the railroad companies.

The entire fill carrying the Union Pacific tracks has been in daily use since it was first constructed. The daily volume of traffic has averaged between one and twenty trains. Subject to such contentions as may hereinafter be made with respect to the high water period of May, 1948, the fill has never subsided, caved or sloughed off and maintenance has

consisted entirely of normal ballasting and normal track maintenance.

- d. The western embankment: The Spokane, Portland & Seattle Railroad Company fill.

From the junction of the Union Pacific Railroad Company fill with the Spokane, Portland & Seattle Railway Company fill north to the Oregon Slough levee is approximately 3,550 feet. Flood protection in this area is provided to Peninsula Drainage District No. 1 by a single structure consisting of the railroad company fills and the fill carrying North **Portland Road**.

Construction of the Spokane, Portland & Seattle Railway Company fill was commenced in 1907 as part of the original construction of that railroad. The fill was built to carry the main line tracks of the railroad part of the way from the high ground north of Columbia Slough to the bridge across Oregon Slough. The distance across this low area is approximately 8,415 feet. From 1907 to 1918 the railroad was carried across this area in part by a fill and in part by trestlework. The southern 5,960 feet (which includes the area that failed), were filled; the next 2,105 feet to the north were trestlework; the last 350 feet were filled. The trestle was required because in 1907 when the railroad was built the area east and upstream of the railroad right of way was not protected from flood during high water of the Columbia River. Thus provision had to be made to permit drainage of that area as the river subsided to normal flow.

The material which was used to construct the 1907 fill was obtained from St. John's cut. It was almost entirely sand. The fill was built by first constructing a work trestle either along the central portion or along one side of the site of the proposed fill. Material was then transported by rail from St. John's cut and dumped through and over the work trestle. The trestle piling was not removed. The stringers were removed. The fill was constructed to an elevation of approximately 46.37 feet m.s.l., with an average crown width of 32 feet and slopes of 1 on $1\frac{3}{4}$ to give an approximate base width at average inside ground level of 172 feet or more. The construction work was done by contractors holding contracts with the Spokane, Portland & Seattle Railway Company and it took place in 1907 and 1908. The work trestle was not intended to and never did carry ordinary railroad traffic. Upon completion of the fill and the removal of the trestle stringers the entire weight of the rail traffic rested on the fill and not the trestle. The fill as thus constructed in 1907 and 1908 extended from the high ground north of Columbia Slough to a point 2,455 feet south of the southern abutment of the Oregon Slough railroad bridge. It was a section of this fill which failed on May 30, 1948.

In 1918 the trestlework to the north of the 1907 fill was filled, partially by hydraulic methods. Sand was dredged from Oregon Slough and pumped over and through the trestle, which was not removed, until the fill reached an elevation of approximately 28

feet m.s.l. To complete the fill to its final elevation of approximately 46.37 feet m.s.l., material was rail hauled from St. John's cut and dumped over and through the trestle. The material was almost entirely sand. The trestle piling was not removed but the stringers were removed. The fill as completed had an average crown width of 32 feet and slopes of 1 on 3 riverward and 1 on 1½ landward to create an average base width at average inside ground level of 131 feet or more.

The entire Spokane, Portland & Seattle Railway Company fill is situated on land owned by that company and the Northern Pacific Railroad Company as tenants in common. A two-thirds interest in the land is owned by the Spokane, Portland & Seattle Railway Company and a one-third interest by the Northern Pacific Railway Company. The fill itself is owned in the same portions by the same companies. Subject to such contentions as may hereinafter be made with respect to the May, 1948, high water period, the fill is and has always been controlled and maintained by the Spokane, Portland & Seattle Railway Company.

The fill is located on the main line of the Spokane, Portland & Seattle Railway Company and it has been in daily use since it was first constructed. Detailed traffic records are not available for the early years but from 1910 when railroad operations began until 1936, an average of not less than 14 passenger trains went across the fill each day, each train weighing an average of from 650 to 1,000 tons. There was in addition a daily movement of freight trains each

weighing an average of between 500 to 2,000 tons. From 1936 to 1942, an average of not less than 20 trains crossed the fill each day, each weighing an average of at least 1,000 tons. From 1942 to date, the fill has carried an average of 45 trains a day, each weighing an average of 1,500 tons.

The detailed train records of the Spokane, Portland & Seattle Railway Company show that during the period from May 15 to and including June 15, 1946, 1,442 trains crossed the fill, weighing a total of 2,526,013 tons. For the same period during 1947, 1,590 trains crossed the fill, weighing a total of 2,951,214 tons. Subject to such contentions as may hereinafter be made with respect to the high water period of May, 1948, the fill has never subsided, caved or sloughed off and maintenance has consisted entirely of normal ballasting and normal track maintenance.

e. The western embankment; North Portland Road.

Immediately to the west of the fill of the Spokane, Portland & Seattle Railway Company is the highway fill supporting North Portland Road. On May 30, 1948, and for several years prior thereto, this fill was separated from the fill of the Spokane, Portland & Seattle Railway Company by a depression 5 or 6 feet deep and 8 to 10 feet wide. The depression did not extend to the original natural ground level and below the surface of the depression the highway fill and the railroad fill joined to constitute a single structure.

This highway fill was constructed in 1933 by Multnomah County, Oregon. The fill was constructed by

hydraulic methods. Sand was dredged from Oregon Slough and pumped to the site of the fill. North Portland Road between Columbia Slough and Oregon Slough lies on a slight grade; hence the elevation of the fill varies from place to place. At the point where the fill failed on May 30, 1948, it had an elevation of 29.9 feet m.s.l., a crown width of 34 feet and slopes of 1 on 5 to give a width to the fill of approximately 83 feet at the point where it joined the Spokane, Portland & Seattle Railway Company fill, and a width at the base of the fill of approximately 175 feet.

The fill and the right of way to maintain it were transferred by Multnomah County to the State of Oregon on September 27, 1933. The fill has ever since been maintained and controlled by the Oregon State Highway Department. In 1933, that Department paved the fill to a width of approximately 22 feet with 7 to 9 inches of concrete. The concrete was laid on a layer of clay one foot thick. The land on which the fill is located does not belong to the United States. Subject to such contentions as may hereinafter be made with respect to the May, 1948, high water period, neither the United States nor any agency or employee of the United States has ever controlled or maintained the fill.

North Portland Road has been in daily use since 1933. Detailed traffic figures are available for the period subsequent to 1939, and they show that traffic over the fill has averaged 1,500 cars per day. The fill has never subsided, caved or sloughed off and

only normal highway maintenance has been required.

9. Comparison of Levee Elevations.

The north or river front levee of Peninsula Drainage District No. 2, after the reconstruction work by the Corps of Engineers, had a mean sea level elevation from station to station as follows:

Nature of Structure	Station	Elevation in Feet
Levee	0/19 to 32/00	34.6
Levee	32/00 to 41/16	34.0
Floodwall	41/16 to 44/62	33.8
Levee	44/62 to 73/50	33.9
Floodwall	73/50 to 79/60	33.9
Levee	79/60 to 104/50	33.0

The south or back levee of Peninsula Drainage District No. 2, after the reconstruction work by the Corps of Engineers, had a mean sea level elevation from station to station as follows:

Nature of Structure	Station	Elevation in Feet
Levee	104/50 to 133/00	35.00
Levee	133/00 to 160/00	34.9
Levee	160/00 to 191/00	34.8
Levee	191/00 to 215/00	34.7
Levee	215/00 to 250/00	34.6
Levee	250/00 to 285/00	34.5

The north or river-front levee of Peninsula Drainage District No. 1, after the reconstruction work by the Corps of Engineers, had a mean sea level elevation from station to station as follows:

Nature of Structure	Station	Elevation in Feet
Levee	2/25 to 20/50	34.9
Levee	20/60 to 36/53	34.8
Floodwall	36/53 to 41/00	34.8
Floodwall	41/00 to 50/80	34.7
Levee	50/80 to 61/55	34.7

The south or back levee of Peninsula Drainage District No. 1, after the reconstruction work by the Corps of Engineers, had a mean sea level elevation from station to station as follows:

Nature of Structure	Station	Elevation in Feet
Levee	125/50 to 150/50	34.7
Levee	150/50 to 175/50	34.8
Levee	175/50 to 200/00	34.9

As indicated above, the lowest point in the levee system of Peninsula Drainage District No. 2 was 1.7 feet below the lowest point in the levee system of Peninsula Drainage District No. 1.

10. Flood Crests in Prior Years.

Records are available at Vancouver, Washington, recording flood crests in the Columbia River since 1901. The ten highest flood crests for the period from 1901 to 1948, and the date of each are listed below:

Year	Flood Crest m.s.l. (1929 adjustment)
1948 June 1, 13, 14	32.4
1933 June 19	27.7
1928 May 31	27.6
1921 June 12	27.4
1903 June 16-17	27.0
1916 July 3-6	26.7
1917 June 22	26.7
1913 June 13	26.6
1927 June 18-20	26.1
1922 June 11	25.6

Records for the Portland guage on the Willamette River are available for the period since 1876. The ten highest flood crests for the period from 1876 to

1948, and the date of each, are set forth below, together with an indication as to whether the flood was principally in the Willamette or Columbia Rivers.

Year	Flood Crest m.s.l. (1929 adjustment)	River
1894 June 7.....	34.2	Columbia
1948 June 1, 14	31.1	Columbia
1876 June 24	29.4	Columbia
1880 July 1-2	28.5	Columbia
1882 June 14-16	27.3	Columbia
1887 June 21	26.9	Columbia
1933 June 13	26.0	Columbia
1928 May 31	25.6	Columbia
1921 June 12, 13	25.5	Columbia
1899 June 23	25.4	Columbia

11. The Construction of Vanport.

Vanport, a war housing project belonging to the United States and located within Peninsula Drainage District No. 1, was constructed for the purpose of providing housing for persons engaged in war work in the Portland, Oregon-Vancouver, Washington, area, and particularly for employees of the three shipyards in that area operated by Kaiser Company, Inc. Vanport was within three miles of each of the three yards.

In the summer of 1942, the Kaiser yards were employing approximately 46,000 persons. Kaiser Company, Inc., expected to expand the operation of the yards and to employ in that connection a total of about 97,000 men. It therefore became necessary to provide housing for the new employees. Since existing facilities in the Portland area were already overburdened, Kaiser Company, Inc., proposed to

the United States Maritime Commission, an agency of the United States, that the company construct with funds to be provided by the Maritime Commission, 10,000 dwelling units in the Portland-Vancouver area, at an estimated cost of \$21,905,400. Of these units, 4,000 were to be located in or near Vancouver, Washington, and 6,000 were to be located in the Portland area. The site proposed by Kaiser Company, Inc., for the 6,000 Portland units was the Vanport site. Kaiser Company, Inc., then held an option to buy 640 acres within Peninsula Drainage District No. 1, and it was proposed that 300 of the 640 acres be used for the housing project. The Kaiser proposal was submitted to the Maritime Commission in July, 1942.

In July, 1942, National Housing Agency, an agency of the United States (created by the President of the United States by Executive Order 9070 dated February 24, 1942), with authority to provide war housing, had no funds available for the Vanport project. It was anticipated that funds for that purpose would become available about September 15, 1942. The Maritime Commission, because of the urgent need for war shipping, was unwilling to delay construction of the Vanport housing until that date. Accordingly, an arrangement was made between the Maritime Commission, National Housing Agency and Kaiser Company, Inc., whereby the Maritime Commission authorized Kaiser Company, Inc., to proceed immediately with the construction of 6,000 units at the Vanport site, at an estimated

cost not to exceed \$13,200,000. It was understood that when Congress provided funds to the National Housing Agency, a formal contract for the construction of the housing would be executed between the National Housing Agency and Kaiser Company, Inc., and that upon the execution of that contract the arrangement between the Maritime Commission and Kaiser Company, Inc., would be cancelled.

These steps were taken as planned. Funds were made available by Congress to the National Housing Agency and thereafter a contract was made between the United States represented by the Federal Public Housing Authority (a constituent unit of National Housing Agency and created by Executive Order 9070 dated February 24, 1942), and Kaiser Company, Inc., whereby Kaiser Company, Inc., agreed on a cost-plus-a-fixed-fee basis to construct the Vanport housing. The contract was executed as of August 1, 1942. Kaiser Company, Inc., in turn subcontracted the construction work to two Portland construction contractors, George H. Buckler and Charles B. Wegman.

Dwelling units at Vanport first became available for occupancy on or about December 15, 1942. The construction of Vanport was substantially completed by August 6, 1943. As completed, Vanport consisted of approximately 1,000 buildings containing approximately 10,000 dwelling units, together with commercial facilities, administrative offices, service annexes and social, recreational and community facilities. The dwelling units at Vanport were fur-

nished at the expense of the United States and the furnishings belonged to the United States. The cost to the United States of constructing and furnishing Vanport, including the cost of the land, was approximately \$25,750,000. The land on which Vanport was built was acquired by the United States from Kaiser Company, Inc., and others by a condemnation proceeding filed in this Court on November 4, 1942.

By an instrument effective as of October 15, 1942, and numbered HA (ORE-35053) mph 101, the United States, acting through the Federal Public Housing Authority, made an arrangement concerning Vanport with the Housing Authority of Portland. Thereafter and on April 12, 1943, these parties entered into a second agreement numbered HA (ORE-35053) mph 102 whereby the instrument of October 15, 1942, was rescinded as of the date of its execution and the instrument of April 12, 1943, substituted in its place. This second instrument continued in effect until the parties on February 17, 1944, executed a new instrument numbered HA (ORE-35021) mph 102 which became effective as of January 1, 1944. This instrument of February 17, 1944, related not only to the premises at Vanport but to other premises as well. It was in effect in May and June, 1948, and thereafter.

12. Construction of Denver Avenue Underpass and Ring Levee.

On August 28, 1942, John E. Mead, Housing Administrator of the Oregon Shipbuilding Corpora-

tion, a company affiliated with Kaiser Company, Inc., wrote to the Oregon State Highway Commission advising the Commission that Kaiser Company, Inc., was constructing a housing project adjacent to Denver Avenue and requesting the highway department to build entrance roads to the project from Denver Avenue by means of an underpass. On September 1, 1942, R. H. Baldock, Chief Engineer of the Oregon State Highway Commission, replied to Mr. Mead stating that the Highway Commission would be pleased to design the underpass and arrange for its construction providing that federal funds were made available to pay for the work. In accordance with this suggestion, the Highway Commission prepared and furnished to Kaiser Company, Inc., detailed plans and specifications for the construction of the underpass. The underpass was constructed in accordance with these plans and specifications.

By an instrument dated October 20, 1942, Kaiser Company, Inc., subcontracted the work of building the Denver Avenue underpass to Tower Sales & Erecting Company, a corporation doing construction in Portland. Tower Sales & Erecting Company in turn made arrangement to have part of the work done by the R. A. Heintz Construction Company of Portland and by Berke Bros. Construction Company of Portland. The actual construction work on the underpass began on or about November 2, 1942, under the supervision of Lowell A. Johnston,

an engineer employed by the Oregon State Highway Commission. It was Mr. Johnston's responsibility to see to it that the underpass was constructed in accordance with the plans and specifications prepared by the Oregon State Highway Commission. The work on the underpass was completed in February or March, 1943.

The original construction of the ring levee began on or about February 19, 1943. The work was done by the contractors working on the Denver Avenue underpass and particularly by Berke Bros. Construction Company. The work continued during March and part of April, 1943. The ring levee was constructed from sand hauled from Sand Island on the Columbia River. The site of the levee was staked out and the sand was dumped at the staked location by trucks which circled the levee. After it was dumped from the trucks, the sand was pushed into place by two D-8 caterpillar bulldozers, each weighing approximately 50,000 pounds. A caterpillar motor grader with a number 12 blade, weighing approximately 23,000 pounds assisted in leveling the sand. The levee was built in six inch lifts, that is, the sand was spread in six inch layers and compacted by the movement of the bulldozers and other equipment across it. The work on the structure was completed in April, 1943.

In the fall of 1943, George H. Buckler, one of the Vanport contractors, made arrangements with Fred Christensen, a Portland contractor, to raise the elevation of the ring levee to 34.9 feet, to widen

its top to a width of 12 feet and to lay a clay blanket on the eastern or outside slope of the levee. During August and September, 1943, Mr. Christensen did this work on the ring levee in accordance with plans furnished him by Kaiser Company, Inc.

The ring levee as thus completed was approximately 800 feet long. Its crown width beginning with its junction with the Denver Avenue fill on the north and continuing for approximately 300 feet was 12 feet. Thereafter the crown width of the levee gradually decreased until at station 4 + 50 (that is, 450 feet from the northern end of the levee) the crown width was 7.5 feet. This crown width continued to the southern end of the levee. The inside or western slope of the levee was 1 on 2; the outside slope was 1 on 1½. The entire structure was completed to an elevation of 34.9 feet m.s.l. The average base width at average ground level of the levee structure itself was approximately 100 feet. Beginning, however, approximately 50 feet from the northern end of the structure the inside slope joined with the fill which had been constructed to support the double roadway leading east through the underpass and circling up to Denver Avenue. This double roadway had a total crown width of approximately 55 feet. It was built on a grade so that in a distance of approximately 900 feet the elevation of the roadway rose from about 20 feet m.s.l., where it left the underpass, to 34.9 feet m.s.l. where it joined Denver Avenue. At the point where the crown width of the ring levee was reduced from

12 to 10.5 feet, that is approximately 300 feet from the northern end of the levee, the roadway was within 7 feet of the top of the levee. At approximately 450 feet from the northern end of the levee, where its crown width was reduced to 7.5 feet, the roadway was within 5 feet of the top of the levee and it continued to rise. The fill supporting the roadway was constructed in March and April, 1943. The material used in the construction was sand obtained in part from the underpass cut through Denver Avenue and in part from Sand Island. The roadway fill had a base width of approximately 70 feet to give a total base width for the levee itself plus the roadway of approximately 150 feet. The outside or eastern slope of the ring levee was covered with a blanket of clay three feet thick. The clay was obtained from an excavation in connection with a housing project on North Interstate Boulevard in the Portland area. It was hauled by trucks to the site of the ring levee and dumped and graded into place. Approximately 8,425 yards of clay were used for the clay blanket on the eastern slope of the levee.

The plans prepared by the Oregon State Highway Commission for the construction of the Denver Avenue underpass and the roadways connected with it called for the installation of an 18-inch culvert beneath the roadway which circled from the underpass up to Denver Avenue. The drainage of this culvert was from west to east and its purpose was to drain the area enclosed by the roadway. The culvert was

installed under the supervision of the Oregon State Highway Commission. When the ring levee was constructed the culvert was extended a short distance on its eastern end. There it joined a 24-inch culvert which roughly paralleled Denver Avenue on the east and which was part of the drainage system for Peninsula Drainage District No. 2. There was a manhole at the junction of the two culverts. This manhole was a short distance, approximately 20 feet, each of the eastern toe of the ring levee. The 18-inch culvert was provided with a flood gate on its eastern end. The purpose and effect of this flood gate was to prevent flood waters in Peninsula Drainage District No. 2 from flowing through the culvert into the underpass area and on into Peninsula Drainage District No. 1. There was no flood gate on the western end of the culvert.

About a hundred feet south of the underpass through Denver Avenue a wooden culvert approximately 5 feet by 5 feet in size passed through the fill supporting Denver Avenue at about ground level. This culvert was installed in the course of the original construction of the Denver Avenue fill. At some later date some person or persons whose identity is not known plugged the ends of this culvert.

13. Repair Work on the Ring Levee.

In the spring of 1944, employees of the Housing Authority of Portland, inspecting the ring levee, observed that cracks and sloughs had developed in

portions of it. Arrangements were then made for employees of the Housing Authority to make a detailed inspection of the condition of the levee, an inspection in which representatives of the Portland office of the Corps of Engineers participated. It was found that the crown of the levee had settled to some extent; that several cracks had developed in the crown, some of them from eight to ten inches wide and extending into the levee two or three feet or more; and that portions of the outside or eastern slope of the levee had sloughed off. This condition was reported to the management of the Housing Authority of Portland and to representatives of the Federal Public Housing Authority. In the summer or fall of 1944, the ring levee was repaired by employees of the Housing Authority of Portland who capped the crown, reworked the areas where sloughs had occurred and filled in the cracks. In the areas in which sloughs had taken place, the outside slope of the levee was extended three or four feet at the toe and the material reworked to that depth up to the crown. The cracks in the crown were filled with earth which was tamped into place; and over the entire crown of the levee a cap of earth a few inches in thickness was installed. As far as is now known, no further sloughs or cracks developed in the levee, no further settlement took place, and no further work was done on it at any time prior to its failure in the high water period of 1948. During the intervening period, that is, from the fall of 1944, until the levee failed, routine inspections of the ring levee were made by representatives of the

Housing Authority of Portland who saw no change in its condition.

14. Union Avenue.

Union Avenue crosses Peninsula Drainage District No. 2 from the northwest corner of the district (where it joins with Denver Avenue) to a point on the south side of the district about 6,500 feet east of Denver Avenue. Union Avenue is one of the approaches to the Interstate Bridge across the Columbia River. It is supported by a fill which was constructed in 1915 and 1916 by Multnomah County, Oregon, at the expense of the Interstate Bridge Commission. The fill was constructed by hydraulic methods on land belonging to Multnomah County. Suction dredges pumped sand from Oregon Slough to the site of the fill. The Union Avenue fill was built to an elevation of approximately 36.6 feet m.s.l. with a crown width of approximately 42 feet (of which approximately 32 feet were paved) and slopes of approximately 1 on $1\frac{1}{2}$ to give a width at average ground level of approximately 125 feet.

The Interstate Bridge Commission transferred control over the fill to Multnomah County, Oregon, and Multnomah County in turn transferred the fill and the land on which it rests to the State of Oregon on January 16, 1931. Since then the fill has always been and now is owned by the State of Oregon and controlled by the Oregon State Highway Department. Neither the land on which the fill is

located nor the fill itself belongs to or has ever belonged to the United States and (subject to such contentions as may hereinafter be made with respect to the high water period of May and June, 1948) at no time has the fill ever been maintained or controlled by the United States or by an agency or employee of the United States. Since March 1, 1931, Union Avenue has been an Oregon state highway.

Two culverts were constructed through the fill which supports Union Avenue. The northern culvert located about 3600 feet southeast of the junction between Denver and Union Avenues was a 60-inch metal culvert installed through the fill in 1919 or thereabouts in a drainage ditch located a few feet below normal ground level. The southern culvert located about 4500 feet southeast of the junction between Union and Denver Avenues was a 48-inch concrete culvert installed through the fill in a drainage ditch located a few feet below normal ground level by Peninsula Drainage District No. 2, with the consent of the Oregon State Highway Commission, in 1938 or 1939. The northern culvert was equipped with a flood gate on the western end. The southern culvert had no flood gate on either end. The purpose of the culverts was to permit drainage water to flow from the area east of Union Avenue through the Union Avenue fill and on to the pumping station located in the southwest corner of the district.

15. Construction of East Vanport.

East Vanport, a war housing project, was constructed in 1943 and 1944, on a location within Peninsula Drainage District No. 2 and near Denver Avenue. The project, its furnishings and the land on which it was constructed all belonged to the United States. Construction of the project began on October 4, 1943; the project buildings were first occupied on January 8, 1944; and construction was completed on March 21, 1944. East Vanport was constructed by Oregon Ship Building Corporation, a company affiliated with Kaiser Company, Inc., on a cost-plus-a-fixed-fee basis. The total cost of the project to the United States, including the cost of the land, was \$1,912,452. The project, as completed, contained 484 dwelling units, a community building and a commercial center. East Vanport was among the projects included in the so-called master lease from the United States to the Housing Authority of Portland, dated February 17, 1944, and effective as of January 1, 1944.

East Vanport was intended to provide temporary housing only. The project was terminated for war housing purposes as of February 11, 1946. Beginning on August 12, 1946, the dwelling units at East Vanport were moved to other communities. Except for twenty units which remained on the properties and were destroyed by the Columbia River flood of May and June, 1948, all the structures at East Vanport were removed on or before October 7, 1946.

16. Land Acquisition by the United States.

The United States on January 12, 1943, filed in this Court a petition for condemnation of 4.22 acres of land in the area of the Denver Avenue underpass and by order of court obtained immediate possession of the property. On May 24, 1943, the petition was amended to include an area of 4.23 acres, and on September 15, 1943, the petition was again amended so that the total area to which it referred was 4.53 acres.

On January 7, 1944, the United States filed a petition for condemnation of, and obtained immediate possession of the land, consisting of 136.11 acres, on which East Vanport was constructed. On June 16, 1944, title to both parcels, that is, the Denver Avenue underpass area and the East Vanport area, was confirmed in the United States by order of this Court. In 1949 and 1950 the United States quit-claimed this land to the City of Portland, subject to a dedication of a portion of the property to the State of Oregon for highway purposes. The ring levee surrounding the Denver Avenue underpass was built on property acquired by the United States in the condemnation proceedings described above.

17. The Relation Between the United States and the Housing Authority of Portland.

Since the repair work on the ring levee was done by employees of the Housing Authority of Portland, the relation between that authority and the United States is or may become important to this litigation. That relation is described below.

a. The Organization of the Housing Authority of Portland.

The Housing Authority of Portland was created on December 11, 1941, by resolution of the City Council of Portland, Oregon, acting under the authority of the Oregon State Housing Authorities Law. In accordance with the provisions of that statute the mayor of Portland appointed five commissioners (later increased to seven upon an amendment of the statute) to manage and direct the Authority. For some years prior to 1941, civic leaders in Portland, and particularly those connected with the Portland Housing and Planning Association, had been giving attention to the local housing situation and the desirability of providing residents with low rent housing. With the development in Portland of defense and war industries, particularly ship construction, it became apparent that some affirmative action was required. The Housing Authority of Portland (HAP) was created in response to this situation.

The persons who served as commissioners of HAP prior to January 1, 1950, and their terms of office, are as follows:

Commissioner	Appointed			Expiration
C. M. Gartrell	12/11/41	Resigned	9/ 1/44	12/11/46
Sanford E. Norby	9/ 1/44	Resigned	1/ 7/49	12/11/51
	1/15/47			
Mrs. Ralph W. Rasmussen	1/10/49			12/11/51
Maria C. Jackson	12/11/41	Resigned	4/14/42	12/11/42
Charles B. Wegman	4/15/42	Resigned	9/12/42	
Harry T. Capell	9/14/42			
	12/11/42	Deceased	10/ 8/45	12/11/47
Charles S. Camplan	10/26/45			
	12/12/47			12/11/52
Herbert J. Dahlke	12/11/41			12/11/43
	12/11/43			12/11/48
	12/29/48			12/11/53
Delmore E. Knickerson	12/11/41	Deceased	6/30/44	12/11/45
H. J. Detloff	7/27/44			12/11/45
	12/20/45			12/11/50
Chester A. Moores	12/11/41			12/11/44
	12/11/44	Resigned	12/17/45	12/11/49
Lamar Tooze	12/20/45	Resigned	12/11/49	12/11/49
Alfred H. Corbett	12/19/49			12/11/54
J. J. Gard	4/ 6/49			3/20/53
Rev. Thomas J. Tobin	4/ 6/49			3/20/54

The HAP commissioners in all instances have been Portland residents prominent in municipal affairs and familiar with housing problems. The commissioners serve without pay.

The persons who served as officers of HAP prior to January 1, 1950, and their terms of office, are as follows:

Chairman	Vice-Chairman	Secretary-Treasurer
C. M. Gartrell	Chester A. Moores	Harry D. Freeman
12/11/41 to 9/ 1/44	12/11/41 to 9/ 7/44	12/30/41 to 4/15/50
Chester A. Moores	Herbert J. Dahlke	
9/ 7/44 to 12/17/45	9/ 7/44 to 12/20/45	
Herbert J. Dahlke	H. J. Detloff	
12/20/45 to 6/16/49	12/20/45 to 6/16/49	
Lamar Tooze	Mrs. Ralph W. Rasmussen	
6/16/49 to 12/11/49	6/16/49 to date	

b. Columbia Villa.

The first project undertaken by HAP was the construction of Columbia Villa, a 400-dwelling unit housing project located in Portland and designed to provide low rent housing to Portland residents. The work on the project began in May, 1942. The completion date was June 15, 1943. To finance the construction of Columbia Villa, HAP, on July 10, 1942, borrowed from the United States, acting through the United States Housing Authority, \$1,-292,000. The loan bore interest at 3 per cent per annum. Since HAP could obtain funds at a lower interest rate from private sources, an arrangement was made whereby HAP borrowed to the extent of its requirements from banks and trust companies and the United States in effect guaranteed the repayment of the loan. On August 3, 1942, HAP, under this arrangement, borrowed \$1,730,000. The United States at the same time agreed that should the occasion arise it would loan an equal amount to HAP and thus put HAP in funds to pay the private

lenders. Upon completion of its loan from private sources, HAP repaid the loan it had obtained from the United States. From time to time, HAP has refinanced its Columbia Villa loan with private lenders and it has from time to time applied net income from the operation of the property to reduce the indebtedness. During May and June, 1948, the amount of the debt was \$1,381,000, and it was owing to the Bessemer Trust Company of New York. The United States has at all times continued the "guarantee" arrangement with HAP, but it has never been called upon to perform its "guarantee" obligations.

The United States, under its Columbia Villa contract with HAP, is obligated to make certain annual contributions (not to exceed in any year 3½% of the cost of constructing the project) to pay any deficiency resulting from the operation of the project as a low rent housing and slum clearance project. These contributions are to be made only as required and only as long as the original indebtedness for the construction of the project remains unpaid. During the period from the construction of Columbia Villa to January 1, 1950, the total amount thus contributed from the United States to HAP was \$51,820.31. This amount was contributed during 1948 and 1949. Prior to 1948 Columbia Villa operated to produce income in excess of expenses.

HAP has agreed with the United States that the dwelling units at Columbia Villa will be rented only to families of low income, that is, to families

who are in the lowest income group and whose income is not sufficient to enable them to live in decent and sanitary private housing. From time to time, HAP, with the approval of the Federal Public Housing Authority, defines in dollars the income group which is entitled to apply for Columbia Villa Housing.

Columbia Villa is owned by HAP and the United States has no interest in the property. As soon as the indebtedness incurred in connection with the construction of the project is paid, all obligations of HAP to the United States in connection with Columbia Villa will terminate and HAP will be entirely free to manage or dispose of the property as it sees fit. In the meantime, HAP maintains and operates the project and selects the tenants for the project within the family income limits agreed upon with the United States. Since the United States is obligated to make annual contributions to the project in the event that operating expenses exceed rental income the annual HAP budget for the project is submitted to and approved by the Federal Public Housing Authority.

c. Other Housing Authority of Portland Projects.

Columbia Villa is owned by HAP. The other housing projects operated by the Authority are all owned by the United States. These federally owned projects were all constructed as war housing projects, and they are all located in Portland. These war housing projects, in addition to Vanport, are as follows:

Name	Approximate Number of Dwelling Units	Approximate Completion Date
Dekum Court	85	June, 1942
The Gartrell Group	725	October 10, 1942
The Guild's Lake Group	2,600	December 27, 1943
University Homes	2,000	November 28, 1942
St. Johns Woods	1,000	October 10, 1943
Parkside Homes	260	January 8, 1943
Slavin Court	75	September 27, 1943
Fulton Homes	324	October 30, 1943
Hudson Street Homes	118	March 1, 1943
Pir Court	72	March 1, 1943
Fairview Homes	265	September 7, 1943
Bellaira Court	110	September 22, 1943
Powers Dormitory	500	September 4, 1943
East Vanport	485	April, 1944
Fessenden Courts	152	January, 1944

With the exception of Dekum Court each of these projects is a temporary project.

With the exception of Vanport and Columbia Villa, each of the projects listed above was constructed under an arrangement whereby HAP made recommendations to the Federal Public Housing Authority, an agency of the United States, as to the necessity for housing in the area and as to available sites, available contractors and desirable types or construction. The construction was then undertaken by local contractors holding contracts with the United States, acting through the Federal Public Housing Authority (FPHA) or its predecessor agencies. Each project as it was completed was the subject of an agreement between the United States and HAP relating to the operation of the premises. Each of the projects was made subject to the so-called master lease of February 17, 1944.

The financial arrangement between the United States and HAP, with respect to Columbia Villa, has been described. The financial arrangement for HAP's other projects is set forth in the so-called master lease of February 17, 1944, as supplemented by the Administration Fund Agreement between the First National Bank of Portland, Oregon, and the Housing Authority of Portland, dated as of February 17, 1944. The arrangement between the parties contemplates that the United States will make, and from time to time the United States has made, advances to HAP to provide that Authority with funds for operating capital, to purchase coal, to purchase other stores, and to make payments in lieu of taxes. Payments in lieu of taxes are made by HAP to state and local governmental agencies in an amount approximately equal to what the taxes on the property would be if it were owned by private persons and not by the United States. The amount, date and purpose of the advances and the repayments of them are as follows:

Housing Authority of Portland, Oregon
Summary of PHA Advances and Repayments
4/1/43 to 1/31/50

Cash Advances				
Date	Working Capital	Cash Advances		Repayments
		Coal Purchases	Stores Inventory	
4/ 1/43	\$ 38,994.50			12/31/45 \$ 38,994.50
	48,570.00			48,570.00
4/13/43	8,500.00			8,500.00
5/30/43	118,274.50			118,274.50
7/31/43	232,325.00			232,325.00
1/31/45			\$ 60,000.00	8/31/45 20,000.00
1/31/45				4/30/45 88,414.00
1/31/45				1/31/46 88,414.00
4/30/45		\$361,369.00		10/31/45 361,369.00
9/30/45		99,000.00		4/30/46 99,000.00
9/30/45		229,300.00		8/31/46 229,300.00
11/30/46	225,000.00			1/31/47 100,000.00
11/30/46				4/30/47 87,500.00
11/30/46				6/30/47 87,500.00
6/30/47			85,000.00	
11/30/47				4/30/48 345,750.00
				345,750.00

11/30/47					191,300.00
11/30/47					154,250.00
<hr/>					
Total	\$671,664.00	\$689,669.00	\$145,000.00	\$1,043,328.00	\$1,953,911.00
Less Repaid	\$546,664.00	\$689,669.00	\$ 20,000.00	\$ 697,578.00	\$1,953,911.00
<hr/>					
Balance 5/31/48	\$125,000.00	-0-	\$125,000.00	\$ 345,750.00	-0-
<hr/>					
Balance Above	\$125,000.00	-0-	\$125,000.00	\$ 345,750.00	\$ 345,750.00
10/ 1/48	174,000.00				174,000.00
10/ 1/48				249,000.00	249,000.00
11/30/48				207,000.00	
<hr/>					
Total	\$299,000.00	-0-	\$125,000.00	\$ 801,750.00	\$ 768,750.00
Less Repaid	174,000.00			594,750.00	768,750.00
<hr/>					
Balance 1/31/50	\$125,000.00	-0-	\$125,000.00	\$ 207,000.00	-0-
<hr/>					
Grand Total					
Advances	\$845,664.00	\$689,669.00	\$145,000.00	\$1,499,328.00	\$2,722,661.00
Less Repaid	\$720,664.00	\$689,669.00	\$ 20,000.00	\$1,292,328.00	\$2,722,661.00
<hr/>					
Balance 1/31/50	\$125,000.00	-0-	\$125,000.00	\$ 207,000.00	-0-
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The accounting between HAP and the United States in connection with these advances is separate and distinct from the accounting between the parties as to profits or losses from the lease operations. The advances are in the nature of loans for specific purposes and HAP has a general obligation to repay them. They are not evidenced by notes or other securities and they do not bear interest.

The financial arrangement between HAP and the United States under the so-called master lease contemplates that there will be an accounting between the parties as to profit or loss from the operation of the premises. Each year HAP prepares and submits to FPFA for its approval a detailed budget of all anticipated expense. If at the end of the year the income from the properties has not totalled the amount of operating expense which has received budget approval, the United States pays the deficiency. If, however, the income from the properties has exceeded the amount of approved operating expense, the excess is paid to the United States. Thus, any net income from the operation of the properties accrues to the United States and any authorized loss is borne by the United States. The result of operations under the so-called master lease are set forth below. The actual accounting between the parties is on an over-all basis rather than by separate projects. The reference, "Prior year adjustment additional," refers to budget and accounting adjustments which were authorized and approved by FPFA subsequent to the close of the fiscal period. The figures in parentheses represent deficits.

Housing Authority of Portland, Oregon
Statement of Operation of Leased Projects Only

	Total P.H.A. Leased		
	Income	Expense	Net
Beginning to			
6/30/43	\$1,993,642.81	\$1,849,082.54	\$ 144,560.27
7/ 1/43 to			
6/30/44	7,185,405.68	5,476,537.83	1,708,867.75
7/ 1/44 to			
6/30/45	7,622,357.34	5,301,880.80	2,320,477.14
7/ 1/45 to			
6/30/46	5,707,954.65	4,959,834.52	748,120.13
Prior Yr. Adj., additional			44,044.44
7/ 1/46 to			
6/30/47	5,416,096.39	4,936,696.12	479,400.27
Prior Yr. Adj., additional			(22,350.33)
7/ 1/47 to			
6/30/48	5,064,818.37	5,177,266.07	(112,447.70)
Prior Yr. Adj., additional			(11,509.78)

As a further expression of the management policy to be adopted in connection with the projects subject to the so-called master lease, HAP adopted Master Management Resolution No. 154. This resolution and its amendments, Resolutions Nos. 204, 216, 279, 286, 339, 391, 412, and 458 (all of which relate to changes in rent schedules) were in effect during May and June, 1948.

Beginning early in 1942, FPHA created and it has since maintained a Manual of Policy and Procedure. Prior to February 24, 1942, when FPHA

was created by Executive Order 9070, United States Housing Authority, a federal corporation, created by Congress, was concerned with low-rent housing and it issued from time to time so-called policy bulletins which described the policy of the agency. The FPHA Manual was, in effect, a continuation of these earlier policy bulletins.

The FPHA Manual is designed (a) to express FPHA policy and requirements on subjects which, under the so-called master lease, are for FPHA decision or approval; (b) to express the views of FPHA on subjects which are for decision by the local housing authorities but which involve the fundamental policy of the housing program; and (c) to provide information which may be of use to the local authorities, such as information concerning new statutes or regulations, the activities of other governmental agencies, etc.

The FPHA Manual is prepared in loose-leaf fashion. From time to time and as changes are made in the applicable Federal statutes, or as new problems or new information comes to hand, FPHA distributes mimeographed releases to be inserted in the copies of the Manual maintained by local housing authorities and other interested persons. These releases are general in their terms in the sense that they are not directed to any particular person or any particular housing authority. Some of the releases relate to new subjects; other supplement or supersede existing releases.

The subjects covered by the releases are as follows: (a) budget and expense, including accounting; (b) care of and accountability for government property including property in a terminated or stand-by status and including the disposition of such property; (c) selection of tenants and rental arrangements; (d) rental rates; (e) community services; (f) commercial operations on the projects; and (g) reports. The releases are sometimes phrased in mandatory language; sometimes they are phrased in advisory or informative language.

The FPHA Manual relates to all housing operations in which FPHA has an interest, including both low rent and war housing. As of any given date, therefore, all the releases in the Manual are not applicable to any particular project. Those which are applicable to a given project can be identified by the content of the releases. During May and June, 1948, there were approximately 125 releases or sections in the Manual relating to the management of war housing projects such as Vanport.

In addition to the Manual, FPHA from time to time has issued a number of advisory bulletins. These bulletins are intended to make available to all the local housing authorities information concerning efficient and economical methods of project operation developed by individual local authorities. With three or four exceptions all such bulletins issued by FPHA have related to construction work rather than to management.

The releases appearing in the FPHA Manual were not published in the Federal register.

d. The employees of the Housing Authority of Portland.

The day to day operations of HAP are in the control of its commissioners and officers. Neither the United States nor any federal agency or employee has participated in any way in the selection of the commissioners for or the officers of HAP. The employees of Housing Authority of Portland are employed by the executive director of the Authority with the approval, in the case of key employees, of the HAP commissioners. The executive director on four or five occasions has discussed persons proposed for employment by HAP with field representatives of FPHA. In each case the proposed employee was selected in the first instance by the HAP executive director and in each instance the decision on employment was made by him. Neither FPHA nor any other agency or employee of the United States has undertaken to suggest to HAP the names of persons whom it should employ. Except as noted above, neither the United States nor any agency or employee of the United States has participated in any way in the selection of the employees of HAP. All employees of HAP receive their instructions from representatives of that organization and not from representatives of the United States. From time to time, however, personnel of HAP personally or by mail have discussed HAP problems with FPHA employees.

The administrative organization of HAP is as follows. The ultimate responsibility for the management of the authority lies with commissioners appointed by the Mayor of Portland. The chief executive officer of the authority is the executive director. All employees of the authority report directly or indirectly to the executive director who in turn reports to commissioners. The principal departments of HAP are the Accounting and Audits Department and the Department for the Management of Projects. During the period of construction of the projects operated by HAP, that organization also had a large Development Department. The Development Department was discontinued in September, 1944. The Accounting and Audits Department has charge of accounts, audits, payrolls and bonds. The Department for the Management of Projects has to do (a) with management functions such as tenant selection, project services, fire and safety, commercial leases, property and procurement and (b) with maintenance, including mechanical, electrical, heating, ventilating and plumbing maintenance for structures, grounds, stores, sanitation and transportation. During May and June, 1948, the personnel complement of the Accounting and Audits Department was approximately twenty-one persons. The Department for the Management of Projects employed approximately 214 persons other than skilled craftsmen and in addition approximately 440 persons in skilled crafts and holding union status. HAP employs a Portland lawyer on a contract

basis. No commissioner, officer or employee of HAP is an officer or employee of the United States or any federal agency, unless HAP is itself a federal agency. During May and June, 1948, there were 675 persons employed by HAP. Of these, 300 were employed at Vanport: 60 as firemen, 15 in accounting work, 5 in project services and the remainder in maintenance work.

The terms and conditions of employment for all employees of HAP are determined by its commissioners. This includes salaries, vacation periods, working hours, rates of pay, etc. The application forms provided to prospective employees of HAP make no mention of the United States or of any federal agency. The checks with which these employees are paid are not Treasury checks and they make no mention of the United States or of any federal agency. The employees of HAP normally receive their pay from funds obtained by HAP from rental payments by its tenants and this was the source of their pay in May, 1948. The employees of HAP take no oath of loyalty to the United States. They do not have civil service status under the rules and regulations of the United States Civil Service Commission. They do not participate in the Federal Employees Retirement Plan. Their rates of pay are not affected by general pay increases authorized by Congress for federal employees. The employees of HAP can be and are discharged by the executive director of the authority. They are the beneficiaries of a workmen's compensation arrangement estab-

lished under Oregon state law. The employees of HAP concerned with maintenance are union members and HAP has a contract with their union. When HAP needs additional help, a HAP representative so advises a union representative and the union selects a man for the employment. The firemen of Vanport were also union members and HAP had a contract with their union. The firemen were selected, however, by HAP and not by the union. Most of the employees of HAP and particularly those connected with the Accounts and Auditing Department and the Maintenance Department work on matters relating to all HAP projects.

e. Selection of tenants.

Since Vanport and East Vanport were erected for the specific purpose of providing housing for persons engaged in war industries, it was agreed between FPHA and HAP that the tenants should be selected entirely from among such persons. In this connection FPHA from time to time and on the advice of the War Manpower Commission and the Army and Navy Departments made available to HAP a list of industries located in the Portland area which were considered to be national defense or war industries. After the termination of active war hostilities the Vanport housing was made available for general housing purposes in the Portland area and during May and June, 1948, the residents of Vanport were engaged in ordinary civilian occupations.

The selection of the individual tenants at Vanport and East Vanport was made by HAP in accordance with the requirements of the Manual of Policy and procedure. Neither the United States nor any federal agency or employee participated in the selection or identification of the tenants who came within the classifications set forth in the Manual. HAP defined, and from time to time redefined with the approval of FPHA, the rents which were to be charged for the occupancy of the Vanport and East Vanport premises. The tenants occupied their dwelling units pursuant to revocable use permit in a form prepared by a lawyer for HAP and approved by FPHA. This revocable use permit named HAP as landlord and made no reference to the United States or to any federal agency. It did, however, conclude with the following language: "No member of or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this permit or to any benefit to arise thereupon."

18. River Stage Forecasts for May and June, 1948.

The United States Weather Bureau began predicting river stages at Portland on May 1, 1948. With a few exceptions a forecast was made each day as to river stage for each of the succeeding four days. The forecasts thus made by the Weather Bureau between May 10, 1948, and June 10, 1948, adjusted to mean sea level, are tabulated below. The actual river stage on the days indicated appear in parentheses. The flood stages were measured at and forecast for the Vancouver, Washington, gauge

rather than Vanport. However, water levels at Vanport and water levels at Vancouver, Washington, gauge are normally the same.

These forecasts were provided by the United States Weather Bureau to the Corps of Engineers. They appeared day by day in the daily newspapers published in Portland and they were announced over the radio. They were also available at the Weather Bureau office in Portland to anyone who cared to inquire.

Actual and Forecasted Stages of Columbia River at Vancouver (Weather Bureau Gauge)
As Converted to Mean Sea Level (1929 Adjustment)

Date of Forecast (actual)	Forecast for (actual)		Forecast for (actual)		Forecast for (actual)		Forecast for (actual)	
May 10 (15.24)	May 11	15.84 (15.84)	May 12	16.54 (16.54)	May 13	17.04 (16.54)	May 14	17.54 (16.44)
11 (15.84)	12	16.54 (16.54)	13	17.04 (16.54)	14	17.34 (16.44)	15	17.54 (16.24)
12 (16.54)	13	16.84 (16.54)	14	16.54 (16.44)	15	16.24 (16.24)	16	16.24 (16.64)
13 (16.54)	14	16.24 (16.44)	15	16.04 (16.24)	16	15.74 (16.64)	17	16.74 (17.04)
14 (16.44)	15	16.24 (16.24)	16	16.24 (16.64)	17	17.24 (17.04)	18	17.44 (17.04)
15 (16.24)	16	16.24 (16.64)	17	17.24 (17.04)	18	17.44 (17.04)	19	17.44 (17.34)
16 (16.64)	17	17.24 (17.04)	18	17.24 (17.04)	19	17.44 (17.34)	20	17.64 (17.94)
17 (17.04)	18	17.24 (17.04)	19	17.24 (17.34)	20	17.44 (17.94)	21	17.74 (18.94)
18 (17.04)	19	17.24 (17.34)	20	17.54 (17.94)	21	18.04 (18.94)	22	18.24 (20.44)
19 (17.34)	20	17.74 (17.94)	21	18.44 (18.94)	22	18.84 (20.44)	23	19.14 (21.84)
20 (17.94)	21	18.64 (18.94)	22	19.34 (20.44)	23	20.04 (21.84)	24	20.44 (23.34)
21 (18.94)	22	19.64 (20.44)	23	20.94 (21.84)	24	21.74 (23.34)	25	22.44 (24.94)
22 (20.44)	23	21.84 (21.84)	24	22.64 (23.34)	25	23.54 (24.94)	26	24.04 (25.64)
23 (21.84)	24	22.94 (23.34)	25	23.94 (24.94)	26	25.54 (25.64)	27	26.24 (26.54)

May 24 (25.34)	May 25 (24.84)	May 26 (25.34)	May 27 (25.04)	May 28 (24.64)	May 29 (25.54)
25 (24.94)	26 (25.54)	27 (25.34)	28 (25.34)	29 (25.54)	30 (27.84)
26 (25.64)	27 (25.74)	28 (26.34)	29 (27.04)	30 (29.94)	31 (30.94)
27 (26.54)	28 (27.74)	29 (28.74)	30 (29.94)	31 (31.44)	June 1 (32.24)
28 (27.64)	29 (29.04)	30 (30.24)	31 (31.44)	June 2 (32.74)	June 3 (32.94)
29 (28.94)	30 (30.24)	31 (31.64)	June 1 (32.24)	June 2 (32.74)	June 3 (32.94)
30 (30.64)	31 (32.14)	June 1 (33.24)	June 2 (33.34)	June 3 (33.94)	June 4 (30.74)
31 (31.54)	June 1 (33.24)	2 (31.04)	3 (31.24)	4 (30.74)	5 (30.24)
June 1 (32.24)	2 (32.24)	3 (31.24)	4 (30.74)	5 (30.94)	6 (31.24)
2 (32.14)	3 (31.54)	4 (31.14)	5 (30.94)	6 (31.44)	7 (31.74)
3 (31.94)	4 (31.44)	5 (31.14)	6 (31.44)	7 (32.54)	8 (33.04)
4 (31.84)	5 (31.64)	6 (31.74)	7 (32.54)	8 (31.94)	9 (31.74)
5 (31.94)	6 (32.24)	7 (32.24)	8 (31.94)	9 (31.84)	10 (31.74)
6 (32.24)	7 (32.24)	8 (32.04)	9 (31.84)	10 (31.94)	11 (31.94)
7 (32.14)	8 (31.94)	9 (31.74)	10 (31.94)	11 (32.24)	12 (32.34)
8 (32.14)	9 (32.04)	10 (32.14)	11 (32.24)	12 (32.34)	13 (32.34)
9 (32.14)	10 (32.14)	11 (32.24)	12 (32.34)	13 (32.34)	14 (32.34)
10 (32.24)	11 (32.34)	12 (32.44)	13 (32.34)	14 (32.44)	

10. The Failure.

During the latter part of May, 1948, the Columbia River and its tributaries were in flood. More than fifty cities and towns, together with suburban and agricultural areas, were affected to a greater or lesser degree by the high water. The flood fight involved 475 miles of levees protecting approximately 200,000 acres of land. On the lower Columbia alone, 61 drainage and diking districts were affected. During the high water period more than 10,000 persons participated in the flood fight and before the flood was over more than 400,000 acres had been inundated, 41 persons had lost their lives and property damage estimated at \$100,000,000 had resulted.

The 1948 flood of the Columbia River was the second highest of record on the river. On June 1 and June 14, 1948, the flood waters reached an elevation of 31.1 feet m.s.l. on the Portland guage. On June 7, 1894, the recorded elevation was 34.2 feet. The next highest flood water elevations were those of June 24, 1876: 29.4 feet; July 1, 1880: 28.5 feet; and June 14, 1882: 27.3 feet.

On May 30, 1948, the water elevation at Peninsula Drainage Districts Nos. 1 and 2 was 30.8 feet m.s.l. The western embankment of Peninsula Drainage District No. 1 failed between 4:00 and 4:30 p.m. on May 30, 1948. The north end of the break was at a point 2,605 feet from the south end of the Spokane, Portland & Seattle Railway Company bridge across Oregon Slough. The south end of the break was at a point 2,850 feet north of the north

end of the railroad bridge across Columbia Slough. The width of the break was 590 feet.

The water as it entered Peninsula Drainage District No. 1 first filled the sloughs and drainage system of the area. It then advanced eastward, spreading across the entire district approximately at the rate at which a person walks. Witnesses to the flooding of the district estimate that the time required to fill the area was between 45 and 70 minutes. Upon the flooding of Peninsula Drainage District No. 1, the Governor of Oregon immediately declared a state of limited emergency. The next morning, on May 31, 1948, the Governor ordered the Oregon National Guard to evacuate, forcibly if necessary, all persons living in Peninsula Drainage District No. 2. The evacuation took place as ordered.

Upon the failure of the western embankment of Peninsula Drainage District No. 1, the flood waters advanced across the district to Denver Avenue and the fill which supports it. A flood fight was conducted along Denver Avenue but between 9:00 and 10:00 p.m., on May 31, 1948, the ring levee at the Denver Avenue underpass failed, permitting the flood waters to encroach upon and eventually fill the area between Denver Avenue and Union Avenue. Between 12:00 p.m., and 1:00 a.m., of the night of May 31-June 1, 1948, the fill supporting Union Avenue failed at the site of the southern culvert beneath the fill. At about the same time the Union Avenue fill also failed at the location of the junction between Union and Denver Avenues. Upon the fail-

ure of the Union Avenue fill the flood waters continued across Peninsula Drainage District No. 2 and eventually filled the entire district. Upon the failure of the western embankment at Peninsula Drainage District No. 1, that district and Peninsula Drainage District No. 2 were placed in charge of the Oregon National Guard, the Oregon State Police and the Sheriff of Multnomah County. This arrangement continued until June 5, 1948, when the Multnomah County Sheriff assumed full responsibility for the area.

Prior to May 30, 1948, no water other than seepage water had entered either Peninsula Drainage District No. 1 or Peninsula Drainage District No. 2. The only levees or embankments which failed in either district were the western embankment of Peninsula Drainage District No. 1, the ring levee surrounding the Denver Avenue underpass and the fill supporting Union Avenue.

20. Plaintiffs and Their Properties.

During May and June, 1948, each of the plaintiffs in these consolidated cases owned property located in Peninsula Drainage District No. 2. The property of some of the plaintiffs was located between Denver Avenue and Union Avenue. The property of other plaintiffs was located east of Union Avenue. Some of the plaintiffs acquired and improved their properties prior to the construction of the Denver Avenue underpass and the ring levee; other plaintiffs acquired their properties prior to that time but improved them thereafter; still other plaintiffs both

acquired and improved their properties subsequent to the construction of the Denver Avenue underpass and the ring levee. During the period of approximately thirty hours between the failure of the western embankment at Peninsula Drainage District No. 1 and the failure of the ring levee, plaintiffs had an opportunity to remove and they did remove much or all of their movable property located in Peninsula Drainage District No. 2.

D. It is further stipulated that duly qualified witnesses would, if called, testify on behalf of the defendant, and that for purposes of these consolidated cases it shall be deemed that such witnesses have so testified, that no one of the plaintiffs ever advised the United States or any agency or employee of the United States that it was his opinion or position (a) that the primary levees surrounding Peninsula Drainage Districts Nos. 1 and 2 were inadequate or in danger of failure or (b) that the construction of the Denver Avenue underpass was in violation of his rights, or (c) that on account of the Denver Avenue underpass the United States had an affirmative duty to provide him with flood protection, or (d) that the ring levee was improperly constructed or negligently maintained, or (e) that any plaintiff communicated with the United States or any employee of the United States in any way whatever in connection with the Denver Avenue underpass or the ring levee. It is further stipulated that the parties or any of them shall be free upon the trial of this action to introduce

further testimony in contradiction to or in support of the testimony to which this Paragraph D refers.

E. It is further stipulated that the answers of the United States now on file in these consolidated cases shall be deemed to be amended to include in each such answer as a separate defense an allegation that the claim of the plaintiff is barred by the statute of limitations.

F. Each of the plaintiffs in each of these consolidated cases contends and the United States denies:

Contentions of Plaintiffs

1. That the Federal Public Housing Authority, at all times mentioned in the complaint, was a governmental agency.

2. That in the matters complained of in the complaint, the Federal Housing Authority acted deliberately and negligently and not as a matter of discretion.

3. That the Court has full and complete jurisdiction over this action by virtue of the Federal Tort Claims Act.

4. That at all times since the creation of Drainage District No. 2, on or about January 18, 1918, Denver Avenue Fill (formerly known as Derby Street Fill) constituted a common boundary between Peninsula Drainage District No. 1 on the West and Peninsula Drainage District No. 2 on the East.

5. The said Denver Avenue Fill constituted an element of security to both Districts Nos. 1 and 2, additional to the levees or dikes around the outer boundary of both districts.

6. That the said Denver Avenue Fill had an elevation of 35 feet at all times subsequent to January, 1942, and in addition to its use as a levee, was also used as a highway, being known as Denver Avenue and/or United States Highway 99.

7. That the Federal Public Housing Authority and/or Maritime Commission owned property on both sides of Denver Avenue, the west portion being occupied by the Vanport Housing Project.

8. That at a point about half way between the north and south boundaries of the Vanport Tract, the Federal Public Housing Authority, acting in its official capacity, and as an agent or instrumentality of the United States of America, cut through Denver Avenue by causing to be excavated an underpass connecting its property east of Denver Avenue with the Vanport Tract.

9. The negligent severance and excavation by the Federal Public Housing Authority of Denver Avenue Fill constituted a continuing negligent act during all times subsequent to August, 1942, up to May 31, 1948.

10. That the plaintiff and other persons similarly situated in Drainage District No. 2 relied on the protection and security against floods and flood water, afforded by the Denver Avenue Fill.

11. That after the severance of Denver Avenue Fill, in the fall of 1942, the Federal Public Housing Authority attempted to erect a substitute barricade against flood or flood waters in Drainage District No. 2, by the construction of a semi-circular ring levee attaching to the east slope of the Denver Avenue levee at points immediately North and South of the severance.

12. That the ring levee so constructed by Federal Public Housing Authority was entirely inadequate for the purpose intended, namely, protection against flood and flood waters, by reason of its composition, width, and height.

13. The fact that the ring levee was inadequate and unsuitable for the purpose intended was known to the Federal Public Housing Authority and the Corps of Engineers, U.S.A.

14. That said inadequate and unsuitable ring levee was not only not improved nor repaired to a point where it was adequate, as the Federal Public Housing Authority should have done, but said agency improperly and improvidently maintained such ring levee allowing it to fall into a state of poor condition and repair.

15. That at no time between November, 1942, and June, 1948, did the Federal Public Housing Authority construct or maintain an adequate levee to replace the security destroyed when it cut Denver Avenue. That the Federal Public Housing Authority used and permitted the use by the public gen-

erally, and particularly tenants in the Vanport Housing Project of the underpass through Denver Avenue Fill, between November, 1942, and June, 1948, during which time the underpass constituted a gaping hole or aperture through Denver Avenue Fill, 138 feet wide at the top of the fill, and approximately 76 feet wide at the bottom of the cut.

16. That the maintenance of the ring levee and the failure to properly maintain, improve, and/or repair the said ring levee by the Federal Public Housing Authority constituted a continuing offense and nuisance at all times between November, 1942, to June, 1948.

17. That Denver Avenue Fill in its entire length north from Columbia slough to the Columbia River constituted an adequate and sufficient levee and barrier against flood waters, reasonably to be expected from the Columbia River, except where Denver Avenue Fill was severed by the underpass.

18. Conceding that Denver Avenue Fill was severed for the underpass, it was still reasonably possible to protect properties lying in Drainage District No. 2 from flood or flood waters encroaching from the West by the construction of an adequate ring levee around the severance. Having severed Denver Avenue, it was the duty of Federal Public Housing Authority to construct an adequate ring levee.

19. That tortious and negligent acts complained

of by the plaintiff were not acts of God, as contended by the defendant.

20. The plaintiff and others similarly situated did not assume, condone nor acquiesce in the tortious and negligent acts of the defendant complained of in the complaint.

21. Section 702 c, Title 33, U.S.C.A., does not apply to the present proceedings. The language of this section must be read in its entirety and in connection with the other provisions of the act of which it is a part, and not read piecemeal.

22. That neither the severance of Denver Avenue Fill nor the construction of the underpass in 1942 were the wrongful acts of the Oregon State Highway Commission, as contended by the defendant. There was nothing the plaintiff, nor others similarly situated, could do as a private citizen to prevent the severance of Denver Avenue Fill by the Federal Public Housing Authority. Permission of the plaintiff and others similarly situated to make the severance, construct the viaduct, and erect the ring levee, was not requested by the Federal Public Housing Authority nor any other agency connected with the defendant. Such acts were done without the knowledge or consent of the plaintiff.

23. Upon learning the intention of the Federal Public Housing Authority to sever Denver Avenue Fill, creating an underpass, and constructing a viaduct and ring levee, Drainage District No. 2 officially objected in writing to the Corps of Engineers,

Department of the Army. The legal obligation of Drainage District No. 2 to maintain its levees was effectively nullified by the tortious and negligent act of the defendant, and Drainage District No. 2 was not thereby rendered responsible.

24. Denver Avenue Fill has been regarded at all times as a dike or levee jointly used by Drainage District No. 1 and Drainage District No. 2, to protect the East and West boundaries, respectively, of said districts.

25. There was nothing in the appearance of the ring levee as it was finally constructed to put the average person observing it upon notice that it was inadequate as a substitute protection for that removed by the construction of the Vanport underpass.

26. The construction by the Housing Authority of Portland of a drain pipe through Denver Fill at the underpass constituted an additional hazard to properties lying in Drainage District No. 2 as it was designed with flood gates which readily permitted waters to run from west to east of Denver Fill, but not from east to west.

27. An additional hazard to properties lying in Drainage District No. 2 was created when a clay blanket of top soil was placed on the east side of the ring levee, whereas no similar clay blanket was placed on the west slope of the ring levee. The east slope of the ring levee was on a ratio of $1\frac{1}{2}$ to 1,

which was too steep for adequate protection against flood waters encroaching from the west.

28. The Housing Authority of Portland is a Federal Agency within the purview of the Federal Tort Claims Law.

29. The Housing Authority of Portland in operating Vanport and maintaining its various facilities including the underpass and ring levee was acting as an operating agency for the Federal Public Housing Authority and the United States of America.

30. The traffic interchange at Union and Denver Avenues was so designed and constructed that the serviceability and function of Denver Fill was not impaired.

31. The public generally and this plaintiff in particular regarded Denver Avenue and fill and the ring levee at the Vanport Underpass as a levee suitable and adequate for protection against flood waters from the west.

32. That the County of Multnomah in accepting a deed from Peninsula Industrial Company under the terms and conditions of such deed had the duty to construct and maintain a fill on said Denver Avenue, the western boundary of Peninsula District No. 2.

33. That under the terms of said deed, 237.06' of the fill was placed on private property of which the said Multnomah County had no control except an agreement to maintain the same. Assuming that

the 80' highway deeded to the County was in the center of this fill, this would leave 118.8' of the fill on the eastern side belonging privately to the adjoining owners and 118.8' on the western side belonging to private owners.

34. That by the terms of said deed to Multnomah County, the grantor in said deed together with its successors in title including the plaintiffs and Peninsula District No. 2 had the right to construct levees, dikes and embankments connecting with the same and to use the fill on Denver Avenue as a levee or dike.

35. That Peninsula District No. 2 and the property owners therein did make use of said fill as a dike or levee and constructed under the terms of said deed levees, fills and embankments connecting therewith on the north and south thereby completing Peninsula District No. 2 with full dike and levee protection from all sides.

36. That when F.P.H.A. cut the underpass through said Denver Avenue Fill they cut through not only the highway, but through private property of 118.8' on the eastern side thereof and 118.8' on the western side thereof and that in cutting such underpass, they received no permission whatsoever from any land owners or from Peninsula District No. 2, gave them no notice of such intention to cut such underpass and did cut the same over the objection of Peninsula District No. 2.

37. That after severing said Denver Avenue

with said underpass, leaving it possible for flood waters or other waters coming from the west to overflow on the Peninsula District No. 2, said F.P.H.A. owed a duty to Peninsula District No. 2 and to all the property owners therein, including the plaintiffs, to construct and maintain a levee or dike surrounding such underpass of equal protection as the Denver Avenue Fill, that is the fill so severed.

38. That F.P.H.A. has been negligent in failing to either construct a dike or levee of equal protection with said Denver Avenue Fill and in failing to properly maintain such protection.

39. That there was no consideration paid for the deed from Peninsula Industrial Company except the agreement on the part of Multnomah County to cut a fill and maintain the same. That the purpose on the part of Peninsula Industrial Company was to provide in this manner for a dike or levee to assist in reclaiming the overflowed ground on either side of the highway belonging to them and now including Peninsula District No. 2.

40. That in taking over the highway from Multnomah County, the State Highway Commission got no more rights than Multnomah County had under the terms of said deed and became subject to the same obligations.

G. With respect to each of the plaintiffs and each of the consolidated cases, the United States contends and the plaintiffs deny:

Contentions of the United States

1. That this Court has no jurisdiction of this action either under the Tort Claims Act or otherwise.

2. That the matters of which plaintiff complains took place prior to the enactment of the Tort Claims Act and therefore that such matters are not actionable under that statute or at all.

3. That the Tort Claims Act confers no jurisdiction on this Court and this Court has no jurisdiction to hear claims, such as those asserted by plaintiff, based upon an alleged breach by the United States of its alleged duties as an owner of property.

4. That the Tort Claims Act confers no jurisdiction on this Court and this Court has no jurisdiction to hear claims, such as those asserted by plaintiff, based upon an alleged failure of the United States, its agencies or employees, to expend public moneys in the construction or maintenance of flood control structures for the benefit of plaintiff.

5. That the matters complained of in the complaint involve the exercise or performance or the failure to exercise or perform a discretionary function or duty as to which there can be no liability under the Tort Claims Act.

6. That the liability, if any, of the United States under the Tort Claims Act arises only on the conditions there stated and only for specific acts of

negligence or wrongful conduct by a specific and identified employee of the United States acting within the scope of his employment.

7. That no employee of the United States was negligent or engaged in any wrongful conduct within the scope of his employment in connection with the matters complained of in the complaint and nothing done or not done by any employee of the United States was the proximate cause of any damage to plaintiff.

8. That all damage to plaintiff was caused by an Act of God for which neither the United States nor its agencies or employees was in any way responsible and for which the United States cannot be held liable.

9. That the United States has no police power; and that neither the United States nor its agencies or employees had any duty to protect plaintiff's property from flood damage.

10. That if any agency of government was responsible for the safety of plaintiff's property, the agencies of government so responsible were the State of Oregon, the County of Multnomah and Peninsula Drainage District No. 2.

11. That plaintiff was himself chiefly and finally responsible for the protection of his property from flood damage.

12. That Denver Avenue, the fill beneath it and the land upon which it rests are and ever since 1937

have been the property of the State of Oregon and controlled and maintained exclusively by the Oregon State Highway Department.

13. That the fill supporting Denver Avenue was not constructed as a levee or for flood control purposes; and that said fill is not and never has been a part of the Columbia River levee system.

14. That Denver Avenue and the fill supporting it were constructed and have ever since been maintained solely and exclusively for highway purposes.

15. That Denver Avenue and the fill supporting it are and for many years have been dedicated to the public for highway purposes; that by reason of said dedication the use of said fill for highway purposes is the paramount use thereof; that neither plaintiff nor any person has or could acquire any right whatever in connection with the Denver Avenue fill limiting or restricting its use for highway purposes.

16. That the underpass beneath Denver Avenue was constructed for a legitimate highway purpose and to meet a legitimate traffic demand; and that the construction of the underpass for highway purposes violated no right of plaintiff.

17. That the underpass beneath Denver Avenue was built by Kaiser Company, Inc., or its subcontractors with the consent of and in accordance with plans furnished by the State of Oregon, the owner of Denver Avenue, the fill supporting it and the land upon which it rests.

18. That in connection with the construction of the Denver Avenue underpass, the State of Oregon did not require the construction of a ring levee or the installation of any flood protection structure whatever.

19. That the construction of the underpass beneath Denver Avenue with the consent of the State of Oregon, the owner of Denver Avenue, the fill supporting it and the land upon which it rests, was not in violation of any obligation owing to plaintiff or any right belonging to plaintiff.

20. That neither the State of Oregon or Kaiser Company, Inc., or its subcontractors or the United States, its agencies or employees, had any obligation whatever by statute, by contract or by law to provide any flood protection whatever to plaintiff or to build or to maintain Denver Avenue and the fill supporting it for flood protection purposes.

21. That in connection with a levee system it is not customary to build or maintain secondary levees and such levees are not required by due care and good engineering practice.

22. That prior to the levee failures of May and June, 1948, there was no reason to anticipate that any of the primary levees surrounding Peninsula Drainage Districts Nos. 1 and 2 would fail and hence due care and good engineering practice did not require the construction or maintenance of secondary levees in the area.

23. That the law regards flood waters as a com-

mon enemy against which each person is entitled to protect himself as and to the extent he sees fit and with no obligation to protect any other person; that the ring levee adjacent to the Denver Avenue underpass was intended to protect the Vanport residents and the \$25,000,000 investment of the United States in Vanport in the event that the primary levees of Peninsula Drainage District No. 2, which were lower than those of Peninsula Drainage District No. 1, were overtopped by flood waters; that plaintiff, although he had no rights in connection with the construction or maintenance of the ring levee, was greatly benefited by its existence.

24. That the United States, its agencies or employees, neither had or assumed any obligation to plaintiff to build or maintain the ring levee carefully or at all.

25. That the United States, its agencies or employees, neither had or assumed any obligation to plaintiff in connection with Denver Avenue, the ring levee or at all.

26. That the United States, its agencies or employees, neither had or assumed any obligation whatever to protect plaintiff or his property from flood damage; that nevertheless plaintiff was greatly benefited during the 1948 high water period by the temporary protection provided by the ring levee constructed adjacent to the Denver Avenue underpass.

27. That one land owner, such as the United States, has no duty to erect an embankment to protect another land owner, such as plaintiff, from flood damage; and that a land owner who erects an embankment for flood protection purposes has no duty to maintain that embankment carefully or at all for the benefit of those who own or occupy property in a location which it appears to protect.

28. That Vanport and East Vanport, including the ring levee and the property upon which it was located, were leased by the United States to the Housing Authority of Portland by the so-called master lease dated February 17, 1944, effective January 1, 1944.

29. That from and after January 1, 1944, the United States, its agencies or employees, had no right of access to or responsibility for the ring levee.

30. That from and after January 1, 1944, the ring levee was maintained by the Housing Authority of Portland.

31. That the Housing Authority of Portland had no duty to plaintiff to maintain the ring levee with due care or at all.

32. That the Housing Authority of Portland is not a federal agency and its employees are not federal employees within the meaning of the Tort Claims Act; and that the United States is not responsible for the negligent or wrongful conduct, if

any, of the Housing Authority of Portland or its employees.

33. That at all times the ring levee was maintained with due care and in accordance with good engineering practice.

34. That prior to the 1948 flood plaintiff did not assert or contend or advise the United States or its agencies or employees that the construction of the Denver Avenue underpass would be or was a breach of any duty owing from the United States to him.

35. That prior to the 1948 flood plaintiff did not assert or contend that the United States or its agencies owed him a duty to build or maintain the ring levee carefully or at all.

36. That prior to the 1948 flood plaintiff did not assert or contend that the ring levee was constructed or maintained in an unsatisfactory or negligent fashion.

37. That prior to the 1948 flood plaintiff did not assert or contend that the ring levee was a nuisance.

38. That by failing at any time prior to the 1948 flood to assert or contend that the construction of the Denver Avenue underpass was a breach of any duty owing to him, by failing to assert or contend that the United States owed him any duty to build or maintain the ring levee carefully or at all and by failing to assert or contend that the ring levee was constructed or maintained in a negligent or wrongful fashion, plaintiff has waived his claim, if any,

against the United States and plaintiff is estopped from asserting any such claim.

39. That subsequent to the construction of the ring levee and prior to the 1948 flood, plaintiff acquired or improved his property and thereby assumed with respect to such property the risk, if any, arising from the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee.

40. That if the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee constituted, as plaintiff now contends, a flood hazard to plaintiff, plaintiff was negligent in failing to take steps to protect his property against that hazard and on account of that negligence plaintiff cannot recover in this action.

41. That no agency or employee of the United States was authorized or instructed by Congress to build or maintain the ring levee for the benefit of plaintiff or to provide flood protection of any kind to plaintiff; and nothing any employee of the United States did or did not do in that connection was within the scope of his employment.

42. That each of the claims of plaintiff is barred by the statute of limitations.

43. That each of the claims of plaintiff is barred by laches and acquiescence.

44. That each of the claims of plaintiff is barred by the provisions of 33 U.S.C.A. 702c.

45. That no act or failure to act of the United States, its agencies or employees, was the proximate cause of any damage to plaintiff.

46. That the United States, its agencies and employees, exercised due care in all matters referred to in the complaint.

47. That each of the contentions of plaintiff is contrary to fact and to law.

48. That each defense set forth in the answer of the United States is a valid defense to plaintiff's claim.

H. The following questions of fact or mixed questions of law and fact are to be determined with respect to each of the consolidated cases:

1. Was the Federal Public Housing Authority, at all times mentioned in the complaint, a governmental agency?

2. In the matters complained of in the complaint, did the Federal Public Housing Authority act deliberately and negligently and not as a matter of discretion?

3. Did the Denver Avenue fill (formerly known as Derby Street fill) constitute a common boundary between Peninsula Drainage District No. 1 on the west and Peninsula Drainage District No. 2 on the east at all times since the creation of Drainage District No. 2?

4. Did the Denver Avenue fill constitute an element of security to both Districts Nos. 1 and 2, addi-

tional to the levees or dikes around the outer boundary of both districts?

5. Did the Denver Avenue fill have an elevation of 35 feet at all times subsequent to January, 1942, and in addition to its use as a levee, was it also used as a highway, being known as Denver Avenue and/or United States Highway 99?

6. Did the Federal Public Housing Authority and/or the Maritime Commission own property on both sides of Denver Avenue and was the west portion occupied by the Vanport housing project?

7. Did the Federal Public Housing Authority, acting in its official capacity and as an agent or instrumentality of the United States, cut through Denver Avenue by causing to be excavated an underpass connecting its property east of Denver Avenue with the Vanport tract at a point about half way between the north and south boundaries of the Vanport tract?

8. Did the severance and excavation by the Federal Public Housing Authority of the Denver Avenue fill constitute a continuing negligent act during all times subsequent to August, 1942, up to May, 1948?

9. Did the plaintiff and other persons similarly situated in Peninsula Drainage District No. 2 rely on the protection and security against floods and flood water afforded by the Denver Avenue fill?

10. Did the Federal Public Housing Authority

attempt to erect a substitute barricade against flood or flood waters in Peninsula Drainage District No. 2, by the construction of a semi-circular ring levee near the east slope of the Denver Avenue fill at points immediately north and south of the severance in the fill?

11. Was the ring levee entirely inadequate for the purpose intended, namely protection against flood and flood waters, by reason of its composition, width, and height?

12. If the ring levee was inadequate and unsuitable for the purpose intended, was that fact known to the Federal Public Housing Authority and the Corps of Engineers?

13. If the ring levee was inadequate and unsuitable, should the Federal Public Housing Authority have repaired the ring levee in a fashion to make it adequate and did said agency improperly and improvidently maintain the ring levee, allowing it to fall into a state of poor condition and repair?

14. Did the Federal Public Housing Authority at any time between November, 1942, and June, 1948, construct or maintain an adequate levee to replace the security destroyed by the underpass through Denver Avenue, a gaping hole or aperture 138 feet wide at the top of the fill and approximately 76 feet wide at the bottom of the cut?

15. Did the maintenance of the ring levee and the failure, if any, to properly maintain, improve, and/or repair the ring levee by the Federal Public

Housing Authority constitute a continuing offense and nuisance at all times between November, 1942, to June, 1948?

16. Did the Denver Avenue fill in its entire length constitute an adequate and sufficient levee and barrier against flood waters reasonably to be expected from the Columbia River except where the Denver Avenue fill was severed by the underpass?

17. Conceding that Denver Avenue Fill was severed for the underpass, was it still reasonably possible to protect properties lying in Peninsula Drainage District No. 2 from flood or flood waters encroaching from the west by the construction of an adequate ring levee around the severance?

18. Were the acts complained of by the plaintiff acts of God, as contended by the defendant?

19. Did the plaintiff and others similarly situated assume, condone or acquiesce in the acts of the defendant complained of in the complaint?

20. Was the severance of Denver Avenue fill or the construction of the underpass in, 1942 the acts of the Oregon State Highway Commission and was there anything the plaintiff, or others similarly situated, could do as a private citizen to prevent the severance of Denver Avenue fill? Was permission of the plaintiff and others similarly situated to make the severance, construct the underpass and erect the ring levee, requested by the Federal Public Housing Authority or any other agency connected with the defendant and were such acts done without the knowledge or consent of the plaintiff?

21. Did Peninsula Drainage District No. 2 officially object in writing to the Corps of Engineers upon learning of the intention to sever the Denver Avenue fill?

22. Has the Denver Avenue fill been regarded at all times as a dike or levee, jointly used by Peninsula Drainage Districts Nos. 1 and 2, to protect the east and west boundaries, respectively, of said districts?

23. Did the matters of which plaintiff complains take place prior to the enactment of the Tort Claims Act?

24. Do the matters complained of in the complaint involve the exercise or performance or the failure to exercise or perform a discretionary function or duty?

25. Was any employee of the United States negligent or engaged in any wrongful conduct within the scope of his employment in connection with the matters complained of in the complaint and was anything done or not done by any employee of the United States the proximate cause of any damage to plaintiff?

26. Was all damage to plaintiff caused by an Act of God?

27. Was plaintiff himself chiefly and finally responsible for the protection of his property against flood damage?

28. Is Denver Avenue, the fill beneath it and the land upon which it rests now, and ever since 1937 has it been, the property of the State of Oregon and controlled and maintained exclusively by the Oregon State Highway Department?

29. Was the fill supporting Denver Avenue constructed as a levee or for flood control purposes; and is said fill now, or has it ever been, a part of the Columbia River levee system?

30. Were Denver Avenue and the fill supporting it constructed and have they ever since been maintained solely and exclusively for highway purposes?

31. Are Denver Avenue and the fill supporting it and have they for many years been dedicated to the public for highway purposes and is the paramount use thereof the use for highway purposes?

32. Was the underpass beneath Denver Avenue constructed for a legitimate highway purpose and to meet a legitimate traffic demand?

33. Was the underpass beneath Denver Avenue built by Kaiser Company, Inc., or its subcontractors with the consent of and in accordance with plans furnished by the State of Oregon?

34. Did the State of Oregon require the construction of a ring levee or the installation of any flood protection structure whatever in connection with the construction of the Denver Avenue underpass?

35. It is customary to build or maintain second-

any levees in connection with levee system and are such levees required by due care and good engineering practice?

36. Was there any reason to anticipate that any of the primary levees surrounding Peninsula Drainage Districts Nos. 1 and 2 would fail and did due care and good engineering practice require the construction or maintenance of secondary levees in the area?

37. Was the ring levee built adjacent to the Denver Avenue underpass intended to protect the Vanport residents and the \$25,000,000 investment of the United States in Vanport in the event that the primary levees of Peninsula Drainage District No. 2, which were lower than those of Peninsula Drainage District No. 1, were overtopped by flood waters, and was the ring levee nevertheless greatly to the benefit of plaintiff?

38. Did the United States, its agencies or employees, assume any obligation to plaintiff to build or maintain the ring levee carefully or at all?

39. Did the United States, its agencies or employees, assume any obligation to plaintiff in connection with Denver Avenue, the ring levee or at all?

40. Did the United States, its agencies or employees, assume any obligation whatever to protect plaintiff or his property from flood damage and was plaintiff nevertheless greatly benefited during the 1948 high water period by the temporary protection

provided by the ring levee constructed adjacent to the Denver Avenue underpass?

41. Were Vanport and East Vanport, including the ring levee and the property upon which it was located, leased by the United States to the Housing Authority of Portland by the so-called master lease dated February 17, 1944, effective January 1, 1944?

42. Was the ring levee maintained by the Housing Authority of Portland from and after January 1, 1944?

43. Was the ring levee, at all times, maintained with due care and in accordance with good engineering practice?

44. Did plaintiff assert or contend or advise the United States, its agencies or employees, that the construction of the Denver Avenue underpass would be or was a breach of any duty owing from the United States to him?

45. Did plaintiff assert or contend or advise the United States that it owed him a duty to build or maintain the ring levee carefully or at all?

46. Did plaintiff assert or contend or advise the United States that the ring levee was constructed or maintained in an unsatisfactory or negligent fashion?

47. Did plaintiff assert or contend that the ring levee was a nuisance?

48. Did plaintiff acquire or improve his property subsequent to the construction of the ring levee and

prior to the 1948 flood and thereby assume with respect to such property the risk, if any, arising from the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee?

49. If the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee constituted, as plaintiff now contends, a flood hazard to plaintiff, was plaintiff negligent in failing to take steps to protect his property against that hazard?

50. Was any agency or employee of the United States authorized or instructed by Congress to build or maintain the ring levee for the benefit of plaintiff or to provide flood protection of any kind to plaintiff; and was anything any employee of the United States did or did not do in that connection within the scope of his employment?

51. Was any act or failure to act of the United States, its agencies or employees, the proximate cause of any damage to plaintiff?

52. Did the United States, its agencies and employees, exercise due care in all matters referred to in the complaint?

I. The following issues of law are to be determined with respect to each of the consolidated cases:

1. Does the Court have jurisdiction of this action by virtue of the Tort Claims Act?

2. Did the failure, if any, to properly maintain, improve, and/or repair the ring levee by the Federal Public Housing Authority constitute a continuing offense and nuisance at all times from November, 1942, to June, 1948?

3. Conceding that Denver Avenue Fill was severed for the underpass, was it the duty of Federal Public Housing Authority to construct an adequate ring levee?

4. Were the acts complained of by the plaintiff acts of God?

5. Did the plaintiff and others similarly situated assume, condone or acquiesce in the acts of the defendant complained of in the complaint?

6. Does Section 702c, Title 33, U.S.C.A., apply to the present proceedings?

7. Was the severance of the Denver Avenue fill a wrongful act of the Oregon State Highway Commission?

8. Was the obligation, if any, of Peninsula Drainage District No. 2 to maintain its levees effectively nullified by the acts of the defendant?

9. Has Denver Avenue Fill been regarded at all times as a dike or levee, jointly used by Peninsula Drainage Districts Nos. 1 and 2, to protect the east and west boundaries, respectively, of said districts?

10. Has this Court jurisdiction of this action either under the Tort Claims Act or otherwise?

11. Are matters which took place prior to the enactment of the Tort Claims Act actionable under that statute or at all?

12. Does the Tort Claims Act confer jurisdiction on this Court and does this Court have jurisdiction to hear claims based upon an alleged breach by the United States of its alleged duties as an owner of property?

13. Does the Tort Claims Act confer jurisdiction on this Court and does this Court have jurisdiction to hear claims based upon an alleged failure of the United States, its agencies or employees, to expend public moneys in the construction or maintenance of flood control structures for the benefit of plaintiff?

14. Do the matters complained of in the complaint involve the exercise or performance or the failure to exercise or perform a discretionary function or duty as to which there can be no liability under the Tort Claims Act?

15. Does the liability, if any, of the United States under the Tort Claims Act arise only on the conditions there stated and only for specific acts of negligence or wrongful conduct by a specific and identified employee of the United States acting within the scope of his employment?

16. Was any employee of the United States negligent or engaged in any wrongful conduct within the scope of his employment in connection with the matters complained of in the complaint and was

anything done or not done by any employee of the United States the proximate cause of any damage to plaintiff?

17. Was all damage to plaintiff caused by an Act of God for which neither the United States nor its agencies or employees were in any way responsible and for which the United States can not be held liable?

18. Has the United States police power and did the United States, its agencies or employees, have any duty to protect plaintiff's property from flood damage?

19. If any agency of government was responsible for the safety of plaintiff's property, were the agencies of government so responsible the State of Oregon, the County of Multnomah and Peninsula Drainage District No. 2?

20. Was plaintiff himself chiefly and finally responsible for the protection of his property from flood damage?

21. Are Denver Avenue and the fill supporting it dedicated to the public for highway purposes and could plaintiff or any person acquire any right whatever in connection with the Denver Avenue fill limiting or restricting its use for highway purposes?

22. Was the underpass beneath Denver Avenue constructed for a legitimate highway purpose and to meet a legitimate traffic demand; and did the con-

struction of the underpass for highway purposes violate any right of plaintiff?

23. Was the construction of the underpass beneath Denver Avenue, with the consent of the State of Oregon, the owner of Denver Avenue and the fill supporting it, in violation of any obligation owing to plaintiff or any right belonging to plaintiff?

24. Does due care and good engineering practice require the construction or maintenance of secondary levees?

25. Did the United States, its agencies or employees, have any obligation to plaintiff to build or maintain the ring levee carefully or at all?

26. Did the United States, its agencies or employees, have any obligation to plaintiff in connection with Denver Avenue, the ring levee or at all?

27. Did the United States, its agencies or employees, have any obligation whatever to protect plaintiff or his property from flood damage; but was plaintiff nevertheless greatly benefited during the 1948 high water period by the temporary protection provided by the ring levee constructed adjacent to the Denver Avenue underpass?

28. Are flood waters regarded in law as a common enemy; and does one landowner, such as the United States, have any duty to erect an embankment to protect another landowner, such as plaintiff, from flood damage; and does a landowner who erects an embankment for flood protection purposes have any duty to maintain that embankment

carefully or at all for the benefit of those who own or occupy property in a location which it appears to protect?

29. Were Vanport and East Vanport, including the ring levee and the property upon which it was located, leased by the United States to the Housing Authority of Portland by the so-called master lease dated February 17, 1944, effective January 1, 1944?

30. Did the United States, its agencies or employees, after January 1, 1944, have any duty in connection with or any responsibility for the ring levee.

31. Did the Housing Authority of Portland have any duty to plaintiff to maintain the ring levee with due care or at all?

32. Was the ring levee maintained with due care and in accordance with good engineering practice at all times?

33. If plaintiff failed at all times prior to the 1948 flood to assert that the construction of the Denver Avenue underpass was a breach of any duty owing to him or to assert that the United States owed him any duty to build or maintain the ring levee carefully or at all or to assert that the ring levee was constructed or maintained in a negligent or wrongful fashion, has plaintiff waived his claim, if any, against the United States and is plaintiff estopped from asserting any such claim?

34. If subsequent to the construction of the ring levee and prior to the 1948 flood, plaintiff acquired

or improved his property, did plaintiff thereby assume with respect to such property the risk, if any, arising from the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee?

35. If the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee constituted, as plaintiff now contends, a flood hazard to plaintiff, was plaintiff negligent in failing to take steps to protect his property against that hazard and in view of that negligence can plaintiff recover in this action?

36. Was any agency or employee of the United States authorized or instructed by Congress to build or maintain the ring levee for the benefit of plaintiff or to provide flood protection of any kind to plaintiff and was anything any employee of the United States did or did not do in that connection within the scope of his employment?

37. Is each of the claims of plaintiff barred by the statute of limitations?

38. Is each of the claims of plaintiff barred by laches and acquiescence?

39. Is each of the claims of plaintiff barred by the provisions of 33 U.S.C.A. 702c?

40. Was any act or failure to act of the United States, its agencies or employees, the proximate cause of any damage to plaintiff?

41. Did the United States, its agencies and em-

ployees, exercise due care in all matters referred to in the complaint?

42. Is the Housing Authority of Portland a federal agency within the meaning of the Tort Claims Act; are the employees of the Housing Authority of Portland employees of the United States within the meaning of that Act; and is the United States responsible for the negligence, if any, of the Housing Authority of Portland or its employees?

J. The following documents and other material have been marked as pretrial exhibits. It is agreed that each pretrial exhibit is what it purports to be and that no further authentication of any pretrial exhibit will be required. It is also agreed that no objection will be made on the ground that the original instrument is not produced. All objections on grounds of relevancy or materiality are reserved and all objections relating to competency on grounds other than authentication are also reserved including, among other things, the hearsay objection. The deposition exhibits shall be used on the terms and to the extent provided by the Federal Rules of Civil Procedure. No distinction has been made in this order between pretrial exhibits for plaintiffs and pretrial exhibits for defendant; and each party shall be free to offer in evidence, upon the terms described above, any one of the pretrial exhibits.

EXHIBITS

No. 1—Map of Peninsula Drainage District No. 1.

No. 2—Map of Peninsula Drainage District No. 2.

No. 3—Plan of the ring levee.

No. 4—Sheet of cross sections of the ring levee.

No. 5—Contract between the United States and Kaiser Company, Inc., for the construction of Vanport, dated August 1, 1942, and numbered HA (ORE 35053) cph 101.

No. 6—Subcontract dated August 15, 1942, between Kaiser Company, Inc., and George H. Buckler.

No. 7—Subcontract dated August 15, 1942, between Kaiser Company, Inc., and Charles B. Wegman.

No. 8—Contract between Kaiser Company, Inc., and Tower Sales & Erecting Company, dated October 20, 1942.

No. 9—Addendum No. 1 to contract dated October 20, 1942, between Kaiser Company, Inc., and Tower Sales and Erecting Company, Inc.

No. 10—Minutes of meeting of Oregon State Highway Commission of March 26, 1937, including resolution whereby Denver Avenue was declared to be an Oregon State Highway.

No. 11—Minutes of meeting of Oregon State Highway Commission of January 16, 1931, including resolution whereby Union Avenue was declared to be an Oregon State Highway.

No. 12—Letter from John E. Mead to State Highway Commission, State of Oregon, dated August 28, 1942.

No. 13—Letter from R. H. Baldock to John E. Mead, dated September 1, 1942.

No. 14—Letter from R. H. Baldock to T. G. Donaca, Secretary, Peninsula Drainage District No. 1, dated September 12, 1942.

No. 15—Letter from Ivan F. Phipps to Oregon State Highway Commission, dated October 10, 1942.

No. 16—Letter from R. H. Baldock to Ivan F. Phipps, dated October 13, 1942.

No. 17—Letter from J. M. Devers to Ivan F. Phipps, dated October 20, 1942.

No. 18—Letter from F. T. Young to Jerry Kelly, dated October 30, 1942.

No. 19—Drawing 6B-6-4, dated October, 1942, and accompanying letter from Mr. Young to Mr. Kelly, dated October 30, 1942.

No. 20—Drawing No. 7778 accompanying letter from Mr. Young to Mr. Kelly, dated October 30, 1942.

No. 21—Drawing No. 7779 accompanying letter from Mr. Young to Mr. Kelly, dated October 30, 1942.

No. 22—Letter from F. T. Young to Jerry Kelly, dated November 16, 1942.

No. 23—Permit from Oregon State Highway Commission to FPHA in connection with the Denver Avenue underpass, dated November 12, 1942.

No. 24—Letter dated August 25, 1943, unsigned, from Fred Christensen to George H. Buckler.

No. 25—Invoice marked paid from Fred Christensen to George H. Buckler, dated September 25, 1943.

No. 26—Order of the County Court of the State of Oregon, dated September 24, 1917, organizing Peninsula Drainage District No. 2.

No. 27—Report of Phillip H. Dater to the Board of Supervisors of Peninsula Drainage District No. 2, dated November 5, 1917.

No. 28—Minutes of special meeting of the Board of Directors of Peninsula Drainage District No. 2 held on September 18, 1942.

No. 29—Minutes of annual meeting of landowners of Peninsula Drainage District No. 2 held on October 26, 1942.

No. 30—Minutes of special meeting of the Board of Supervisors of Peninsula Drainage District No. 2 held on November 30, 1942.

No. 31—Minutes of special meeting of the Board of Supervisors of Peninsula Drainage District No. 2 held on April 19, 1943.

No. 32—Deposition of Donovan C. Byers.

No. 33—Deposition of Kenneth C. Todd.

No. 34—Deposition of Francis John Kernan.

No. 35—Deposition of Ivan F. Phipps.

No. 36—Organization papers of HAP.

No. 37—HAP bylaws.

No. 38—Lease between United States and HAP dated October 15, 1942.

No. 39—Lease between United States and HAP dated April 12, 1943.

No. 40—Lease between United States and HAP dated February 17, 1944.

No. 41—Amendment No. 1 to master lease.

No. 42—Amendment No. 2 to master lease.

No. 43—Amendment No. 5 to master lease.

No. 44—Amendment No. 6 to master lease.

No. 45—Amendment No. 7 to master lease.

No. 46—Master management resolution No. 154.

No. 47—FPHA release No. 4615:1.

No. 48—Annual contributions contract between HAP and United States, dated February 7, 1942.

No. 49—Administration fund agreement dated February 17, 1944.

No. 50—Contract for financial assistance between HAP and FPHA, dated March 16, 1943.

No. 51—Amendment to contract for financial assistance.

No. 52—Revised form of use permit HAP-216.

No. 53—Application for family dwelling HAP No. 221.

No. 54—Agreement of mutual assistance between Portland and HAP.

No. 55—HAP form of application for employment.

No. 56—HAP form entitled "Payroll Account."

No. 58—HAP form 217.

No. 59—Contract dated April 1, 1947, between HAP and Portland Building Trades' Council.

No. 60—Amendment to this contract dated August 19, 1948.

No. 61—Contract between HAP and Building

Service Employees International Union Local No. 49, dated April 1, 1947.

No. 62—Contract between HAP and Upholsters International Union Local No. 65, dated April 1, 1947.

No. 63—Contract between HAP and International Association of Machinists, dated April 1, 1947.

No. 64—Map showing ownership of land by United States east of Denver Avenue.

No. 65—Sections from FPHA Manual of Policy and Procedure as follows:

- (a) Section 4110:1.
- (b) Section 4110:1.
- (c) Section 2114:1.
- (d) Section 4110.
- (e) Section 4110:3.
- (f) Section 4040:1.
- (g) Section 4040:3.
- (h) Property Survey Action.
- (j) Section 4820:5.
- (k) Section 3831:1.
- (l) Section 3805:4.
- (m) Section 4658.1.
- (n) Section 4650:1.
- (o) Regional Supplement.
- (p) Section 4650:6.
- (q) Regional Supplement.
- (r) Section 4646:1.
- (s) Section 3646:8.
- (t) Exhibit to same.

- (u) Section 4644:6.
- (v) Regional Supplement.
- (w) Section 3635:5.
- (x) Section 4634:1.
- (y) Section 3632:1.
- (z) Section 4621:1.
- (aa) Section 4621:2.
- (bb) Section 4621:6.
- (cc) Section 3655:4.
- (dd) Section 4614:4.
- (ee) Section 4614:14.
- (ff) Temporary Regional Circular & Supplements.
- (gg) Regional Supplement.
- (hh) Regional Supplement.
- (ii) Section 4138:1.
- (jj) Regional Supplement.
- (kk) Section 4138:7.
- (ii) Section 4135:5.
- (mm) Section 4135:3.
- (oo) Section 4135:6.
- (pp) Transmittal No. 102.
- (qq) Regional Supplement.
- (rr) Section 4150:2.
- (ss) Transmittal Bulletin No. 63.
- (tt) Regional Supplement.
- (uu) Regional Supplement.

No. 66—Report entitled “Completion Report, 1948 Columbia River Flood Fight, Peninsula Drainage District No. 2, Multnomah County, Oregon.”

No. 67—Series of photographs taken in vicinity of Denver Avenue, A to K inclusive.

No. 68—Deed from Peninsula Industrial Company to Multnomah County, dated May 16, 1915.

No. 69—Deed from Peninsula Industrial Company to Multnomah County, dated December 21, 1926.

No. 72—Petition for reorganization of Drainage District No. 2, dated March 26, 1928.

No. 73—Order of Probate Court of Multnomah County, dated May 19, 1928, confirming the amended plan of organizations.

No. 74—Assessment of property of Drainage District No. 2, dated August 22, 1928.

No. 76—Proceedings in Civil No. 1604 in the United States District Court for the District of Oregon.

No. 77—Proceedings in Civil No. 1746 in the United States District Court for the District of Oregon.

No. 78—Proceedings in Civil No. 2333 in the United States District Court for the District of Oregon.

Conclusion

This pretrial order has been formulated after conferences at which the litigants and their respective attorneys have appeared in court. There are no issues of law or fact except those embodied in this order and this order supersedes the pleadings as to issues of law and fact. This order will control the course of the trial and shall not be amended ex-

cept by consent of the parties and the Court, or by order of the Court to prevent manifest injustice.

Dated at Portland, Oregon, this 4th day of August, 1953.

/s/ JAMES ALGER FEE,
District Judge.

Approved:

/s/ HENRY L. HESS,
United States Attorney.

.....,
Assistant United States
Attorney.

/s/ WALKER LOWRY,
Special Assistant to the
Attorney General.

Approved:

/s/ WM. C. RALSTON,
/s/ [Indistinguishable.]
/s/ VIRGIL CRUM,
Attorneys for Plaintiffs.

/s/ McDANNELL BROWN,
Attorney for Plaintiff Trachi.

Schedule A

- C-4857 Amphitheaters Inc. vs. U.S.A.
- C-4685 Bailey, Robert R. and Florence M. vs.
 U.S.A.
- C-4806 Blake, Erwin M. and Margaret C. vs.
 U.S.A.
- C-4858 Boyce, Elma vs. U.S.A.
- C-4860 Brooks, George R. and Elva vs. U.S.A.
- C-4859 Bucher, Virgil and Leanora Mae vs. U.S.A.
- C-4686 Buyers, Donovan C. and Marielouise vs.
 U.S.A.
- C-4861 Castro, Gerald and Elsie vs. U.S.A.
- C-4687 Columbia River Land Company vs. U.S.A.
- C-4688 Columbia Way Motel vs. U.S.A.
- C-4862 Commonwealth Inc. vs. U.S.A.
- C-4796 Crowley, Frank J. and Clara vs. U.S.A.
- C-4797 Gazeley, H. M. and Thelma T. vs. U.S.A.
- C-5331 Gerke, Walter H. et ux vs. U.S.A.
- C-4863 Grant, Westley vs. U.S.A.
- C-5556 Graven, Walter E. and Geraldine M. vs.
 U.S.A.
- C-4689 Gustin, K. P. and Julia vs. U.S.A.
- C-4690 Hansen, Hal vs. U.S.A.
- C-4864 Helder, Daniel E. and Margaret Thake vs.
 U.S.A.
- C-4987 Hudman, W. P. and Mary Adeline vs.
 U.S.A.
- C-5557 Jenkins, John F. and Valera vs. U.S.A.
- C-5645 Keen, Charles M. and Penelope J. vs.
 U.S.A.
- C-4568 Kernan Livestock Farm Inc. vs. U.S.A.

- C-4798 Klahn, Richard H. and Gladys H. vs. U.S.A.
- C-4799 Krieger, John M. and Levina J. vs. U.S.A.
- C-4807 Krimbel, Robert J. and Harriette S. vs. U.S.A.
- C-5315 Krueger, Herbert Jr. et ux. vs. U.S.A.
- C-4691 Leaverton, J. Karl and Louise vs. U.S.A.
- C-4800 Liles, Walter Theodore vs. U.S.A.
- C-4808 Marvel, A. R. and Dorothy L. vs. U.S.A.
- C-4693 Matheny A. W. and George vs. U.S.A.
- C-4692 Matheny & Bacon Inc. vs. U.S.A.
- C-4694 McMahon, Pearl vs. U.S.A.
- C-4865 Merrifield, Roy R. and Frances vs. U.S.A.
- C-4866 Milbrandt, W. W. and Ruth M. vs. U.S.A.
- C-4867 Northwest Properties Inc. vs. U.S.A.
- C-5459 N. W. Sports, Inc. vs. U.S.A.
- C-4695 Oregon Sportservice, Inc. vs. U.S.A.
- C-4868 Peck, Elwin C. and Cleo E. vs. U.S.A.
- C-4869 Phipps, Ivan F. and Dorothy S. vs. U.S.A.
- C-4870 Plunkett, James A. and Lucille vs. U.S.A.
- C-4696 Portland Meadows vs. U.S.A.
- C-4801 Powers, Frank J. vs. U.S.A.
- C-4871 Romeiko, Joe and Julia vs. U.S.A.
- C-4802 Schlessner, C. C. vs. U.S.A.
- C-5603 Seivert, R. A. et al. vs. U.S.A.
- C-4809 Tylden, Jennings E. and Byrnece vs. U.S.A.
- C-4872 Warren Packing Co. vs. U.S.A.
- C-4803 Weiler, Max W. and Marxan vs. U.S.A.
- C-5549 Wickstrom, Nels F. et ux vs. U.S.A.
- C-5633 Charles Trachi vs. U.S.A.

[Endorsed]: Filed August 4, 1953.

[Title of District Court and Cause.]

OPINION

February 23, 1954

James Alger Fee, Chief Judge:

The plaintiffs, owners of property within the boundaries of Peninsula Drainage District No. 2, brought actions in fifty-two several cases against the United States for damage caused by floodwaters to their individual properties.

There was a comprehensive pretrial order and a trial. The facts are.

On May 16, 1915, Peninsula Industrial Company conveyed to Multnomah County a strip of land cutting through a large body of property, most of which, in the absence of protecting dikes, would be inundated during periods of normal flow of the Columbia River, the waters of which ran either in the channels or sloughs on all sides of this body of land. The consideration of the deed to this strip was the erection of a mound carrying a highway which was to be maintained by the county. In accordance therewith, a highway, one of the approaches to the Interstate Bridge across the Columbia River to Vancouver, Washington, was placed on this bank.

On March 26, 1937, this highway, then called Denver Avenue, was conveyed to the Oregon State Highway Commission. This was the boundary ac-

cepted by two drainage districts, called, respectively, Peninsula Drainage District No. 1, which was downstream, and Peninsula Drainage District No. 2, which was upstream. Plaintiffs in these cases own property in the latter, which was organized under the drainage district laws of the State of Oregon in 1917. District No. 1 was protected from flood on the north, west and south by railroad fills and by constructed levees, none of which was owned or managed by the United States. These same works protected District No. 2 on its western side. District No. 2 built dikes between 1917 and 1921 on its north, south and east sides, which connected with the works of District No. 1 above described, and thus accomplished complete circumvolution of both. Neither district spent time or money in attempting to strengthen the mound carrying Denver Avenue.

Between 1934 and 1944, the United States, acting under the authority of Congress, reconstructed the north, south and east levees of District No. 2 with concrete walls and earth fills. Control of these levees was formally surrendered to District No. 2 on August 2, 1944. Although the work and the plans therefor were approved by District No. 2, there was no request by anyone that the Denver Avenue fill be strengthened as part of the protective works.

The United States, also pursuant to congressional authority, rebuilt the north and south levees of

District No. 1. Notwithstanding the plans for the work were approved by District No. 1, there was no suggestion from anyone that the western embankment, owned and in control of the railroads but adopted by both districts as an existing work, should be reconstructed or strengthened by the United States.

In 1942, the government condemned a great portion of the land in District No. 1, and the City of Vanport was erected thereon. Control of this area was eventually placed in the Portland Housing Authority.¹ The State Highway Commission, which had already constructed two underpasses² in Denver Avenue, was requested to and did build with federal funds an underpass through the fill for the convenience of persons living in both drainage districts. No protest was made by District No. 2, nor any suggestion by anyone that District No. 2 needed protection from waters from the west. It is true, a resolution mildly suggesting that objection to the construction of the underpass without a "stop log" was passed by its board of directors and placed among the minutes of the Board, but it seems never

¹The Portland Housing Authority is a federal agency and its employees are employees of the government. But that does not help the plaintiffs. *Clark vs. United States*, 109 F. Supp. 213, 223.

²One of these was not within the boundaries of the levee systems of Districts Nos. 1 and 2, and the other affected the system in no way but to lower the Denver Avenue fill by four feet.

to have been called to the attention of anyone outside this group.

However, upon protest of District No. 1, a ring levee was built on land condemned by the federal government at the opening of the underpass upon the upriver side in District No. 2. The purpose of this ring levee was to afford some protection to District No. 1 from overflow by floodwater from the east if the dikes of District No. 2 were overtopped. As is readily seen, this fill, including the ring levee, could have been strengthened as a part of the work which was then being done upon the other protective works of the two districts by the United States engineers. This ring levee did in fact afford some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when the western embankment failed.

On May 30, 1948, between 4:00 p.m. and 4:30 p.m., in one of the greatest floods of the Columbia River in recorded history, the western embankment, which was the railroad fill adapted by these districts, failed, permitting the water flooding to overflow that area. The waters were held by the Denver Avenue highway fill until between 9:00 p.m. and 10:00 p.m., on May 31, 1948, when the ring levee constructed on the east of the underpass to protect District No. 1 from water approaching from that direction failed, and, as a result, District No. 2 and the properties of plaintiffs were inundated.

This is a case of afterthought, not forethought, on the part of plaintiffs and District No. 2.

These landowners themselves continuously excluded the Columbia River from part of its ancient bed for their own purposes. For the major portion of their lands are below the originary high water level of the Columbia River and in places more than thirty-two feet below the flood level reached at the time of the failure of the western embankment of District No. 1.

In order to construct or to have benefit of defensive works, these landowners or their predecessors, under Oregon statutes, formed a drainage district which was endowed with certain sovereign powers and was charged, as was each acre within its boundary, with the responsibility of erecting adequate works for protecting lands from overflow.³ This duty was continuous and involved repair, maintenance and strengthening of existing walls.

The very purpose of the creation of this subdivision of the State of Oregon was that protective function. This is the law and essence of its being. In accordance with the immemorial custom of the village communities of early England⁴ and a like

³Oregon Laws, 1915, c. 340, provides that a drainage district may be formed for the purpose of having the lands within it "reclaimed, and protected * * * from the effects of water, * * *." See O.R.S. 547.005.

⁴It is pointed out in the Introduction to *A Terrier of Fleet Lincolnshire*, Nielson (Oxford University Press, 1920), a manuscript, the latest document of which is dated 1320, that the incidence of the duty to repair dikes was customarily apportioned among

policy crystallized in the statute law of the State of Oregon,⁵ this Court has held that the burden of maintaining adequate seawalls and works for drainage runs with each acre of the protected lands, no matter if the sovereign be the owner.⁶ This municipality, not the United States, is charged with the responsibility for prevention of overflow of water upon lands belonging to the individual plaintiffs. These very plaintiffs, as owners of such lands, owed the duty of protection to the whole area within the municipality.

District No. 2 adopted the western embankment as one of its guards against overflow, as it did the other works which primarily defended District No. 1.⁷ This the District had a legal right to do under

the land affected. "In Walsoken, for example, every acre repaired four feet of sea-bank and one foot of Podike; every acre in West Walton repaired six feet two inches of sea-bank and one foot of Podike." (p. xiv). See also II Cooley's Blackstone 908 (Book III) (4th Ed., 1899).

⁵Oregon Laws, 1915, c. 340, § 17, provides that the costs of constructing and maintaining protective works shall "be apportioned to and levied on each tract of land within said district * * *." Laws, 1921, c. 14, provides that "lands belonging to the State of Oregon * * * shall be subject to the same burdens and liabilities * * * as lands in said district belonging to private individuals." O.R.S. 547.455.

⁶United States vs. Florea, 68 F. Supp. 367. See also United States vs. Aho, 68 F. Supp. 358.

⁷The Plan for Reclamation adopted by District No. 2 recited that District No. 1 was protected "by

the statutes of the state.⁸ The breaking of the western embankment upon which these landowners relied for safety was the sole cause of disaster. It has already been decided that the United States owed no duty to insure the stability of the western wall.⁹ The government had not built this rampart, did not own it, did not own the ground upon which it stood, and did not at the date of failure and had not previously exercised any control over this structure designed to carry railroads.

The government did not construct or have control over Denver Avenue or the bypass, although this was built with federal funds, and the ring levee stood on lands which it had condemned. Denver Avenue was not designed as a water repellant wall.¹⁰

its west, north, and south levees, connecting with system No. 2." District No. 2 planned to construct levees on the east, north and south. The plan concluded, "It is apparent that this will affect a complete closure of the land included in this district against high water."

⁸Oregon Laws, 1915, c. 340, § 29. O.R.S. 547.315.

⁹Clark vs. United States, 109 F. Supp. 213, 220: "No duty of the United States to maintain this embankment can be discovered * * *."

¹⁰Plaintiffs contend that language of the deed from Peninsula Industrial Company to Multnomah County establishes their right to have Denver Avenue maintained as a dike. They place their reliance on the following: "* * * this conveyance is

It is specifically stated that no reliance was placed upon it, and it is mentioned only casually as furnishing additional protection.¹¹ In fact, it did so even in this disaster. But no one contemplated Denver Avenue as a bulwark against the weight of water such as was cast against it when the western embankment broke.

It is true that one who destroys a dike against flood waters would be liable for damage proximately caused thereby.¹² But for six years after the underpass was cut and the ring levee constructed, the Drainage District, which had the continuous duty of maintenance, strengthening and repair, did not do anything with either Denver Avenue or the western embankment. All this time, the District possessed sovereign power of eminent domain and as-

made upon the following express conditions: * * * (a) * * * Multnomah County shall * * * construct * * * a fill and embankment * * * and shall * * * provide and thereafter maintain a public highway [thereon] * * *."

¹¹The Plan for Reclamation of District No. 2 states: "* * * this fill upon completion of District No. 2 will not act as a dike. * * * It will, however, constitute an additional element of security * * *."

¹²For example, one who suddenly releases flood waters from a dam is held liable for the damage caused thereby. *Crawford vs. Cobbs & Mitchell*, 121 Oregon 628; *Loveless vs. Ruffcorn*, 143 Iowa 221; *House vs. Los Angeles County Flood Control District*, 25 Cal. 2d 384.

essment for these express purposes.¹³ Therefore, the cutting of the underpass and the failure to provide unbreakable work may have been a condition which resulted in damage, but it was not a cause, proximate or otherwise.

But, it is said, the Court is bound by its previous decisions,¹⁴ the principles of which fix liability here on the United States. It is true that it has been held here that an employee of the Portland Housing Authority can by wrongful act or omission bind the government in damages.¹⁵ Also, where the government acts in creating a situation on land under its control which would be held negligent under the laws of the particular state if done by a private corporation, the government can be held liable under the statute.¹⁶ Furthermore, the particular agent who performed the act or was guilty of the omission need not be pointed out and proved by name.¹⁷

¹³Oregon Laws, 1915, c. 340; O.R.S. 547.305, 547.455, et seq.

¹⁴Plaintiffs cite two decisions of this Court in support of their contentions, *Ure vs. United States*, 93 F. Supp. 779, and *United States vs. Florea*, 68 F. Supp. 367. They attempt to distinguish *Clark vs. United States*, 109 F. Supp. 213, which denied to residents of Vanport recovery for damages caused by the same disaster as involved herein.

¹⁵*Clark vs. United States*, 109 F. Supp. 213, 223.

¹⁶*Ure vs. United States*, 93 F. Supp. 779, 792.

¹⁷This implication seems to arise from the language of the Court in the case of *Dalehite vs. United*

Where such an act or omission is proved, responsibility cannot be escaped simply because there was a choice of means exercised by some government officer or agent.¹⁸ The exercise of administrative

States, 346 U. S. 15, 44-45, where it is said: "It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. * * * But the statute requires a negligent act." These two sentences are diametrically inconsistent. For the purposes of clarity, it is noted that, in the instant case, this Court, in finding no liability here, does not rely upon the fact that the individual agents of the government are not named or designated. The statute says, "The United States shall be liable, respecting tort claims, in the same manner and to the same extent as a private individual under like circumstances." If, under the law of the state, a private individual could be held for release of waters over the land of another, the United States can be also. Inaccurately labeling the state doctrine as one invoking "liability without fault" by arbitrary fiat determines there can be no fault except negligence. Here this Court only holds that a private person would not be liable under the exact circumstances.

¹⁸In order to make this clear, the Court draws a vital distinction between injuries which are the direct result of the plan adopted in discretion and the result of carelessness or wilfulness in execution or result in a direct trespass illegally. If in discretion, it is decided to poison coyotes, the government will still be liable, as would a private person, for setting a spring gun without proper safeguards to discharge the poison into the mouth of the animal (*Worley vs. United States*, Civ. 5336, opinion dated November 17, 1952, D.C. Ore.), where the detonating of explosive caused direct trespass to plaintiff's lands even if discharged according to plans, the United States should be liable. *Boyce vs. United*

discretion as a result of "policy judgment and discretion" may free the government from liability in handling explosives necessary for national defense in time of war.¹⁹ But the application of such a principle here or in the cases just mentioned would emasculate the statute and return us to the day when the sovereign could do no wrong.²⁰

Here, the United States is not liable. The government owed no duty to these landowners. The employees of the Portland Housing Authority are not shown to have done anything legally significant. The United States was not responsible for the failure of the western embankment, which was the sole cause of disaster. The government had not deliberately banked waters high over the lands of plaintiffs and permitted these to overflow. No lia-

States, 93 F. Supp. 866 should be disapproved, since the individual who set off the blast could have been held personally liable for trespass even though they followed the plan and were employed by the United States. The reason why the result in *Thomas vs. United States*, 81 F. Supp. 881, is correct is because of the statute exonerating the United States from damage by flood. The Court is carefully refraining from basing nonliability upon the discretionary clause of the statute which only covers injuries resulting directly from major policy decisions.

¹⁹*Dalehite vs. United States*, *supra*.

²⁰Justice Jackson, dissenting in *Dalehite vs. United States*, 346 U. S. 15, 60, expresses a fear that the interpretation therein of the Tort Claims Act merely amends the ancient adage to read, "The King can do only little wrongs."

bility was thus established by creating a highly dangerous situation.²¹ These were flood waters and were not part of a column of water which agents of the government were conducting when the break occurred.²² So there could be no trespass. The government agents were not in control of the waters so that the doctrine of *res ipsa loquitur* would apply.²³ No act or omission was proved which constituted negligence on the part of any agent of the government. Finally, the United States is not liable for damage caused by flood.²⁴

Findings, conclusions and judgment in accordance herewith and in favor of the United States should be drawn by the attorneys and submitted to the Court.

²¹Oregon cases dealing with liability for damage caused by the creation of highly dangerous conditions and the theories on which such liability is based are discussed in *Ure vs. United States*, 93 F. Supp. 779, 788-791.

²²The United States was held liable for damage negligently caused by a break in a canal built high on a hillside, flooding plaintiff's lands. *Ure vs. United States*, 93 F. Supp. 779.

²³The "control" required before the doctrine of *res ipsa loquitur* may be applied is carefully analyzed in *Gow vs. Multnomah Hotel, Inc.*, 191 Oregon 45.

²⁴"No liability of any kind shall attach to or rest upon the United States for any damage from or by floodwaters at any place." 33 U.S.C.A. § 702(c). *Clark vs. United States*, 109 F. Supp. 213.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These cases (Nos. 5190, 4857, 4865, 4806, 4858, 4860, 4859, 4686, 4861, 4687, 4688, 4862, 4796, 4797, 5331, 4863, 5556, 4689, 4690, 4864, 4987, 5557, 5645, 4568, 4798, 4799, 4807, 5315, 4691, 4800, 4808, 4693, 4692, 4694, 4685, 4866, 4867, 5459, 4695, 4868, 4869, 4870, 4696, 4801, 4871, 4802, 5603, 4809, 4872, 4803, 5549 and 5633) were consolidated and tried during August, 1953, before the above-entitled Court, the Honorable James Alger Fee, Chief Judge, presiding and sitting without a jury. The parties appeared by their respective counsel and introduced evidence, both oral and documentary. The cases were briefed and submitted to the Court for consideration and decision. After due consideration the Court, being fully advised, makes its findings of fact and conclusions of law as follows:

Findings of Fact

1. The Court by this reference adopts as part of these findings of fact the findings of fact in the opinion of the Court on file in these consolidated cases and the Statement of Agreed Facts set forth in Paragraphs 1 to 20, inclusive, of Section C of the pretrial order on file herein.

2. On May 16, 1915, Peninsula Industrial Company conveyed to Multnomah County, Oregon, a strip of land cutting through a large body of prop-

erty, most of which, in the absence of protecting dikes, would be inundated during periods of normal flow of the Columbia River, the waters of which ran either in channels or sloughs on all sides of this body of land. The consideration of the deed to this strip was the erection of a mound carrying a highway which was to be maintained by the County. In accordance therewith, a highway, one of the approaches to the Interstate Bridge across the Columbia River to Vancouver, Washington, was placed on this bank. This highway became known as Denver Avenue. On March 26, 1937, the Oregon State Highway Commission took over control of Denver Avenue by resolution of the State Highway Commission and on that date Denver Avenue became an Oregon State highway. Since then Denver Avenue has been owned by the State of Oregon and controlled by the Oregon State Highway Department.

3. Denver Avenue was the boundary accepted by two drainage districts called, respectively, Peninsula Drainage District No. 1, which was downstream, and Peninsula Drainage District No. 2, which was upstream. District No. 1 was protected from flood on the north, west and south by railroad fills and levees. District No. 2, in which plaintiffs owned property, adopted these works (which primarily protected District No. 1), as protection for District No. 2 from the west. On the north, south, and east District No. 2 built dikes which connected with the works of District No. 1, thus accomplishing a complete circumvolution of both districts. None

of these fills, dikes and levees was owned or controlled by the United States.

4. In 1942 the United States condemned a great portion of the land in District No. 1 and the City of Vanport was erected thereon. For the convenience of persons living in both districts an underpass through the Denver Avenue fill was built with federal funds. The underpass was built with the approval and under the supervision of the Oregon State Highway Commission. No protest against construction of the underpass was made by District No. 2. A resolution mildly suggesting objection to the construction of the underpass without a stop-log structure was passed by its board of directors, but it seems never to have been called to the attention of anyone outside that group.

5. Upon protest of District No. 1, a ring levee was built, on land condemned by the United States, at the opening of the underpass upon the upriver side and in District No. 2. The purpose of this ring levee was to afford some protection to District No. 1 from overflow by floodwater from the east if the dikes of District No. 2 (which were lower than those of District No. 1), were overtopped. As a matter of actual fact the ring levee also afforded some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when on May 30, 1948, the western embankment of District No. 1 failed.

6. On May 30, 1948, between 4:00 p.m. and

4:30 p.m., in one of the greatest floods of the Columbia River in recorded history, the western embankment at District No. 1 failed, permitting the flood waters to overflow that area. The flood waters, approaching Denver Avenue from the west, were held by the Denver Avenue highway fill until between 9:00 p.m. and 10:00 p.m. on May 31, 1948, when the ring levee constructed on the east of the Denver Avenue underpass failed. Thereupon District No. 2 and the properties of plaintiffs were inundated.

7. The failure of the western embankment at District No. 1 was the sole cause of damage to plaintiffs. That embankment, a fill designed to carry railroads and owned and controlled by the railroad companies, had been adopted by both Districts Nos. 1 and 2 as one of the flood protective works. The United States had not built the western embankment, did not own it, did not own the ground upon which it stood and did not at the date of failure and had not previously exercised any control over the structure. The United States had no duty to insure the stability of the western embankment. The cause of the failure of the western embankment has not been shown and appears to be unknown. There has been no proof of negligence in connection with the construction, maintenance or operation of the western embankment.

8. Denver Avenue, the boundary between the two districts, was not intended to be a levee and was not designed as a water-repellent wall or structure.

The Plan for Reclamation of District No. 2 specifically stated that no reliance was placed on Denver Avenue, and Denver Avenue is mentioned only casually as furnishing additional protection. Neither District No. 1 nor District No. 2 ever spent time or money in attempting to strengthen Denver Avenue. In the period between 1934 and 1944, the United States, acting through the Corps of Engineers, reconstructed the north, south and east levees of District No. 2. District No. 2 approved the plans for the work but made no request that Denver Avenue be strengthened as part of the protective works. Denver Avenue was built and has ever since been used for highway purposes. Neither Multnomah County, the State of Oregon, the United States nor anyone else has or had any obligation to maintain Denver Avenue as a levee or for flood protection purposes.

9. The flood water which inundated plaintiffs' property approached Denver Avenue and the ring levee from the west. In the exercise of due care, there was no reason to anticipate a failure of the western embankment or any embankment of District No. 1, and hence no reason to anticipate that flood waters would ever approach Denver Avenue and the ring levee from the west. No one contemplated Denver Avenue as a bulwark against a weight of water such as was cast against it when the western embankment at District No. 1 broke. The failure of the ring levee and the inundation of the plaintiffs' property resulted from a set of circumstances

unforeseen by anyone, including plaintiffs, and which in the exercise of due care could not have been foreseen.

10. Peninsula Drainage District No. 2, in which plaintiffs' property was located, was organized by plaintiffs or their predecessors in interest under the drainage district laws of Oregon in 1917. District No. 2 was endowed with certain sovereign powers and was charged, as was each acre within its boundaries, with the responsibility of erecting adequate works for protecting the district lands from overflow. This duty was continuous and involved repair, maintenance and strengthening of existing walls and structures. District No. 2 at no time contributed to the construction or maintenance of Denver Avenue, and during the entire period of approximately six years between the time when the Denver Avenue underpass and ring levee were constructed and the time of the 1948 flood, District No. 2 did nothing with respect to Denver Avenue, the underpass or the ring levee. District No. 2 and not the United States had the duty of providing flood protection for lands within the district. District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands. The construction of the underpass and the failure to provide an unbreakable ring levee was not the cause, proximate or otherwise, of any damage to plaintiffs.

11. The Housing Authority of Portland is a

federal agency and its employees are employees of the United States.

12. The employees of the Housing Authority of Portland are not shown to have done anything legally significant. Plaintiffs have failed to prove any negligence or wrongful conduct on the part of the Housing Authority or its employees.

13. Plaintiffs have failed to prove any negligence or wrongful conduct on the part of the United States or its employees or that plaintiffs suffered damage on that account.

14. Plaintiffs have failed to prove that the construction of the Denver Avenue underpass or the construction or maintenance of the ring levee surrounding that underpass violated any right of plaintiffs, that the ring levee was inadequate for the purpose intended or that, under the circumstances, the purposes for which the ring levee was constructed were not the proper purposes.

15. The contentions of plaintiffs as set out in the pretrial order that the construction of the Denver Avenue underpass was negligent, wrongful and a trespass on plaintiffs' property, that the Denver Avenue fill constituted a levee and, as such, part of the plan for reclamation of District No. 2, that plaintiffs relied on the Denver Avenue fill as security against flood waters, that the ring levee around the Denver Avenue underpass was inadequate and unsuitable for the purpose intended, that the ring levee was negligently maintained and constituted a nuisance, and that the County of Mult-

nomah and its successors in interest had an obligation to maintain the Denver Avenue fill as a dike, have not been proved.

16. The United States has proved facts sufficient to establish that it had no duty to protect plaintiffs or their property, that nothing done or left undone by the United States or its employees constituted a violation of any right of plaintiffs, and that there is no proof of any wrongful act or omission on the part of the United States or its employees.

Conclusions of Law

1. The Court by this reference adopts the conclusions of law set forth in the opinion of the Court on file in these consolidated cases.

2. The jurisdiction of this Court is invoked under the provisions of the Federal Tort Claims Act.

3. The legal rights and duties of the parties to these actions depend on the Federal Tort Claims Act and the law of Oregon.

4. Under the law of Oregon damages can be recovered only if a duty is owing from the defendant, the defendant has breached that duty and injury and damage have resulted to the plaintiff for which the breach of duty is the proximate cause.

5. Under the law of Oregon the legal duty to protect plaintiffs' property from flood damage rested on Peninsula Drainage District No. 2 and on plaintiffs themselves as land owners within the district. This duty was continuous and involved the repair, maintenance and strengthening of existing

flood protection structures. Neither the United States nor its employees owed plaintiffs any duty to protect plaintiffs' land from overflow or flood damage.

6. The sole cause of damage to plaintiffs was the failure of the western embankment at District No. 1. The United States was not responsible for the failure of the western embankment and no act or omission of the United States or its employees had causal connection with any damage to plaintiffs' property.

7. Neither the United States nor its employees has been proved to be guilty of negligence or wrongful conduct within the meaning of the Federal Tort Claims Act.

8. The provisions of 33 U.S.C.A. 702(c) that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River Basin; and it is not repealed by the Federal Tort Claims Act.

9. The United States is entitled to judgment.

10. Each party shall bear his or its own costs of suit.

These findings of fact and conclusions of law are in accordance with the pretrial order, the record made on the trial of the actions and the opinion of the Court heretofore filed in these consolidated cases.

Dated: September 14, 1954.

/s/ JAMES ALGER FEE,
Circuit Judge; Sitting by
Special Assignment.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 14, 1954.

In the District Court of the United States
for the District of Oregon
Civil No. 5190
(And Related Cases)

MEARL C. TILLMAN and EMILY P. TILL-
MAN, Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

These cases (Nos. 5190, 4857, 4865, 4806, 4858, 4860, 4859, 4686, 4861, 4687, 4688, 4862, 4796, 4797, 5331, 4863, 5556, 4689, 4690, 4864, 4987, 5557, 5645, 4568, 4798, 4799, 4807, 5315, 4691, 4800, 4808, 4693, 4692, 4694, 4685, 4866, 4867, 5459, 4695, 4868, 4869, 4870, 4696, 4801, 4871, 4802, 5603, 4809, 4872, 4803, 5549 and 5633), were consolidated and tried during August, 1953, before the above-entitled Court, the Honorable James Alger Fee, Chief Judge, presiding and sitting without a jury. The parties appeared by their respective counsel and introduced evidence, both oral and documentary. The cases were briefed

and submitted to the Court for consideration and decision. After due consideration the Court, being fully advised, and having reached its decision and having made and filed its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That plaintiffs, and each of them, take nothing by their complaint;
2. That each party bear its or his own costs.

Dated: September 14, 1954.

/s/ JAMES ALGER FEE.

Circuit Judge; Sitting by
Special Assignment.

[Endorsed]: Filed September 14, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America, Defendant, and to C. E. Luckey, United States Attorney for the District of Oregon, Herbert Brownell, Attorney General of the United States of America, and Walker Lowry, Special Counsel, Attorneys for Defendant:

Please Take Notice that the plaintiffs in the above-entitled cause, and each and all of the plaintiffs in the following related and consolidated cases, to wit, No. C-4857 Amphitheaters, Inc., an Oregon corporation, No. C-4806 Erwin M. Blake and Mar-

garet C. Blake, No. C-4685 Robert R. Bailey and Florence M. Bailey, No. C-4858 Elma Boyce, No. C-4859 Lenora Mae Bucher, Administratrix of the Estate of Virgil Bucher, Deceased, and Lenora Mae Bucher, No. C-4686 Donovan C. Byers and Marie Louise Byers, No. C-4860 George R. Brooks and Elva Brooks, No. C-4796 Frank J. Crowley and Clara Crowley, No. C-4687 Columbia River Land Company, a corporation, No. C-4688 Columbia Way Motel, a corporation, No. C-4862 Commonwealth Inc., an Oregon corporation, No. C-4861 Gerald Castro and Elsie Castro, No. C-4797 H. M. Gazeley and Thelma T. Gazeley, No. C-4863 Westley Grant, No. C-4689 K. P. Gustin and Julia Gustin, No. C-4690 Hal Hansen, No. C-4568 Kernan Livestock Farm Inc., No. C-4798 Richard H. Klahn and Gladys M. Klahn, No. C-4799 John M. Krieger and Levina J. Krieger, No. C-4807 Robert J. Krimbel and Harriette S. Krimbel, No. C-4864 Neal R. Crounse, Administrator of the Estate of Daniel E. Helder, Deceased, and Margaret Thake, No. C-4691 Anna Leaverton, Executrix of the Estate of J. Karl Leaverton, Deceased, and Anna Louise Leaverton, No. C-4800 Walter Theodore Liles, No. C-4808 A. R. Marvel and Dorothy L. Marvel, No. C-4866 W. W. Milbrandt and Ruth M. Milbrandt, No. C-4693 A. W. Matheny and George Matheny, No. C-4692 Matheny & Bacon Inc., a corporation, No. C-4694 Pearl McMahon, No. C-4685 Roy R. Merrifield and Frances Merrifield, No. C-4867 Northwest Properties Inc., an Oregon corporation, No. C-4695 Oregon Sportservice, Inc., an Oregon corporation, No.

C-4868 Elwin C. Peck and Cleo E. Peck, No. C-4696 Portland Meadows, a corporation, No. C-4870 James A. Plunkett and Lucille Plunkett, No. C-4801 Frank J. Powers, No. C-4869 Ivan F. Phipps and Dorothy S. Phipps, No. C-4871 Joe Romeiko and Julia Romeiko, No. C-4802 C. C. Schlessner, No. C-4809 Jennings E. Tylden and Byrnece Tylden, No. C-4803 Max W. Weiler and Marian Weiler, No. C-4872 Warren Packing Company, an Oregon corporation, Ivan F. Phipps and Dorothy S. Phipps, husband and wife, and T. G. Donaca and Marjorie C. Donaca, husband and wife, No. C-4987 W. P. Hudman and Mary Adeline Hudman, No. C-5556 Walter E. Graven and Geraldine M. Graven, No. C-5557 John F. Jenkins and Valera Jenkins, No. C-5645 Charles M. Keen and Penelope J. Keen, No. C-5459 Northwest Sports, Inc., an Oregon corporation, No. C-5603 R. H. Seivert and Doris Seivert, No. C-5633 Charles Trachi, No. C-5315 Herbert B. Krueger, Jr., and Alleen E. Krueger, No. C-5549 Nels F. Wickstrom and Hazel Wickstrom, and No. C-5331 Walter Gerke and Florence Gerke, appeal from the judgment entered in the above-entitled cause and related cases on the 14th day of September, 1954, and from the whole thereof, to the United States Court of Appeals, for the Ninth Circuit.

/s/ VIRGIL CRUM,

/s/ WM. C. RALSTON,

Attorneys for Plaintiffs.

Service of Copy acknowledged.

[Endorsed]: Filed November 9, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas Mearl C. Tillman and Emily P. Tillman, Plaintiffs, and each and all of the plaintiffs in the related and consolidated cases, to wit: No. C-4857, Amphitheaters, Inc., an Oregon corporation; No. C-4806, Erwin M. Blake and Margaret C. Blake; No. C-4685, Robert R. Bailey and Florence M. Bailey; No. C-4858, Elma Boyce; No. C-4859, Lenora Mae Bucher, Administratrix of the Estate of Virgil Bucher, Deceased, and Lenora Mae Bucher; No. C-4686, Donovan C. Byers and Marie Louise Byers; No. C-4860, George R. Brooks and Elva Brooks; No. C-4796, Frank J. Crowley and Clara Crowley; No. C-4687, Columbia River Land Company, a corporation; No. C-4688, Columbia Way Motel, a corporation; No. C-4862, Commonwealth, Inc., an Oregon corporation; No. C-4861, Gerald Castro and Elsie Castro; No. C-4797, H. M. Gazeley and Thelma T. Gazeley; No. C-4863, Westley Grant; No. C-4689, K. P. Gustin and Julia Gustin; No. C-4690, Hal Hansen; No. C-4568, Kernan Livestock Farm, Inc.; No. C-4798, Richard H. Klahn and Gladys M. Klahn; No. C-4799, John M. Krieger and Levina J. Krieger; No. C-4807, Robert J. Krimbel and Harriette S. Krimbel; No. C-4864, Neal R. Crounse, Administrator of the Estate of Daniel E. Helder, Deceased, and Margaret Thake; No. C-4691, Anna Louise Leaverton, Executrix of the Estate of J. Karl Leaverton, Deceased. and Anna Louise

Leaverton; No. C-4800, Walter Theodore Liles; No. C-4808, A. R. Marvel and Dorothy L. Marvel; No. C-4866, W. W. Milbrandt and Ruth M. Milbrandt; No. C-4693, A. W. Matheny and George Matheny; No. C-4692, Matheny & Bacon, Inc., a corporation; No. C-4694, Pearl McMahon; No. C-4685, Roy R. Merrifield and Frances Merrifield; No. C-4867, Northwest Properties, Inc., an Oregon corporation; No. C-4695, Oregon Sportservice, Inc., an Oregon corporation; No. C-4868, Elwin C. Peck and Cleo E. Peck; No. C-4696, Portland Meadows, a corporation; No. C-4870, James A. Plunkett and Lucille Plunkett; No. C-4801, Frank J. Powers; No. C-4869, Ivan F. Phipps and Dorothy S. Phipps; No. C-4871, Joe Romeiko and Julia Romeiko; No. C-4802, C. C. Schlessler; No. C-4809, Jennings E. Tylden and Byrnece Tylden; No. C-4803, Max W. Weiler and Marian Weiler; No. C-4872, Warren Packing Company, an Oregon corporation; Ivan F. Phipps and Dorothy S. Phipps, husband and wife, and T. G. Donaca and Marjorie C. Donaca, husband and wife; No. C-4987, W. P. Hudman and Mary Adeline Hudman; No. C-5556, Walter E. Graven and Geraldine M. Graven; No. C-5557, John F. Jenkins and Valera Jenkins; No. C-5645, Charles M. Keen and Penelope J. Keen; No. C-5459, Northwest Sports., Inc., an Oregon corporation; No. C-5603, R. H. Seivert and Doris Seivert; No. C-5633, Charles Trachi; No. C-5315, Herbert B. Krueger, Jr., and Alleen E. Krueger; No. C-5549, Nels F. Wickstrom and Hazel Wickstrom, and No. C-5331, Walter

Gerke and Florence Gerke, appeal to the United States Court of Appeals of the Ninth Circuit from a certain judgment in the above-entitled cause and related cases dated September 14, 1954.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, the Fidelity and Deposit Company of Maryland, of Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland and empowered to become surety upon bonds, undertakings, etc., does hereby undertake and promise, on the part of the appellant, that said appellant will pay all costs in a sum not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified.

Signed and sealed this .. day of November, 1954.

[Seal]

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

By /s/ CLARENCE D. PORTER,
Attorney-in-Fact.

Countersigned:

/s/ CLARENCE D. PORTER,
Resident Agent.

Service of Copy acknowledged.

[Endorsed]: Filed November 9, 1954.

[Title of District Court and Cause.]

ORDER

This Cause coming on for hearing upon stipulation by counsel for plaintiffs in the above-entitled cause and related and consolidated cases, and counsel for defendant, and the Court being fully advised in the premises:

It Is Hereby Ordered that upon the appeal of this case to the United States Circuit Court of Appeals, for the Ninth District, that the pleadings in the above-entitled cause are typical of the pleadings in all related and consolidated cases and the issues involved are identical; that the pleadings in this case, *Tillman vs. United States of America*, No. 5190, only shall be forwarded to the Circuit Court of Appeals and shall apply to all related and consolidated cases, and the decision of the said Circuit Court of Appeals will be applied to and followed in all related and consolidated cases.

It Is Further Ordered that the original files, including the pleadings, findings, judgment, pretrial order, transcript of evidence, and all other original files in the case of *Tillman vs. United States of America*, No. 5190, shall be forwarded to the Circuit Court of Appeals for the record on the appeal in these cases.

It Is Further Ordered that since there is a multitude of exhibits as well as a considerable portion of the pretrial order and other evidence and matters produced which are unnecessary to the determination of the issues arising upon the appeal, that it

shall only be necessary to print such portions as the plaintiffs and defendant may desire, either by stipulation or by notice in the usual manner as provided by the rules of said Circuit Court of Appeals, for the Ninth District.

That subject to and with the consent of said Circuit Court of Appeals either party may refer to or use any portions of the record not so printed in their briefs or arguments and this record shall be sufficient to question any order, judgment, finding, or decree on the grounds that it is not supported by the evidence.

Dated, this 9th day of November, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 9, 1954.

United States District Court
District of Oregon
Civil No. 5190
(And Related Cases)

MEARL C. TILLMAN and EMILY P. TILLMAN,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

August 4, 1953.

Before: Honorable James Alger Fee,
Chief Judge.

Appearances:

W. K. PHILLIPS,
WILLIAM C. RALSTON,
VIRGIL CRUM, and
KERMIT SMITH,

Of Attorneys for Plaintiffs.

WALKER LOWRY,
Special Assistant to the Attorney-General,
Of Attorneys for the Defendant.

HENRY L. HESS,
United States Attorney, for the District of
Oregon,
Of Attorneys for the Defendant.

TRANSCRIPT OF PROCEEDINGS

The Court: You may proceed, gentlemen.

Mr. Phillips: If it please your Honor, I think counsel for all of the plaintiffs and the Government have worked out a plan of trial or procedure in this action which we would like to submit to your Honor for your approval if you can go along with us. I think it would facilitate greatly the trial.

We have agreed and have had marked the pre-trial exhibits consecutively, and not by Plaintiff and Defendant.

The Court: Yes.

Mr. Phillips: The reason for that being that both parties desire to use all of the exhibits or any

one of them that they see fit, and we have so stipulated, with the approval of your Honor.

The Court: Yes.

Mr. Phillips: I think the pre-trial order, with the exception, of course, of the historical background and that sort of thing, and incidentals, has been based practically all upon these exhibits. We thought in that way that in both briefing and argument it would help counsel and also your Honor if we could do it that way, and offer the pre-trial exhibits consecutively and all at one time without specifying each and every one, if that is agreeable to your Honor.

The Court: Yes.

Mr. Phillips: At this time, if the Court please, the plaintiffs would offer Pre-Trial Exhibits 1 to 78, inclusive, excepting, however, your Honor, Pre-Trial Exhibit 32, Pre-Trial Exhibit 33, Pre-Trial Exhibit 34 and Pre-Trial Exhibit 35, [2*] which are depositions that we will offer soon; also excluding Pre-Trial Exhibits T-4 and T-5, which are minutes of a meeting that are not in the pre-trial exhibits and I don't believe will be produced as exhibits in this case.

We offer them at this time, if the Court please.

Mr. Lowry: Your Honor, the Government has no objection. I think, though, the record ought to show that some of the documents which we have marked as pre-trial exhibits and which Mr. Phillips has just offered turned out to be unavailable and,

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

hence, there can be no offer of those documents. Simply for the purpose of keeping the Clerk from looking for documents that do not exist, may I note that there is no Exhibit 57, there is no Exhibit 65-i, there is no Exhibit 70, and Exhibit 71 is a repetition of an earlier exhibit number, so that there is no Exhibit 71, nor at this time, at least, is there any Exhibit 75.

Mr. Phillips: I didn't know that, your Honor. I have no pride of authorship here. I would like to withdraw the offer of those specific exhibits.

The Court: I will strike those out of the pre-trial order.

Mr. Lowry: That is quite satisfactory.

The Court: Or will show in the pre-trial order that they are not available. Subsequently, if you get any of them then they can be submitted.

Mr. Lowry: With that exception, your Honor, the Government [3] has no objection.

The Court: All right. The eliminations are made, and the Court admits all the other exhibits, with the exceptions mentioned, by the consent of the United States.

Mr. Phillips: That is correct, your Honor.

(Whereupon the documents above referred to, marked as Pre-Trial Exhibits 1 to 78, inclusive, with the exception of Pre-Trial Exhibits 32, 33, 34, 35, 57, 65-i, 70, 71 and 75, were received in evidence.)

Mr. Phillips: We also have another idea, your Honor, that we all think to be a good one, if your

Honor will go along with us, and that is as to Exhibits 32, 33, 34 and 35, which are depositions of witnesses that have been taken. Both parties believe that in briefing this case or in argument we would like to have these depositions in place and stead of having to have the testimony of the witnesses transcribed, and we would like very much to use the depositions in place and stead of the testimony of the witnesses, if your Honor would agree to that.

The Court: Yes.

Mr. Phillips: I might say to your Honor there is in Exhibit No. 32 one question, I believe, that the Government is objecting to and which we have agreed with the Government should not be in there. That is the last answer on Page 13 [4] of Exhibit 32. I believe that is the only objection the Government has, to that one answer, and we agreed to have that stricken, your Honor.

The Court: Yes.

Mr. Lowry: Your Honor, Mr. Phillips is right. We have no objection. I would like to say just this much, though: As your Honor will discover, these depositions were taken by the Government for discovery purposes. That meant, of course, that we asked all the questions we could think of, and we listened to rumors and speculation and that sort of thing which normally would not be presented in the course of the trial. I think, however, that your Honor will see as readily as we do what part of this evidence is really within the knowledge of the vari-

ous deposing witnesses, and accordingly, as I have said, we have no objection to the offering of this evidence.

The Court: The depositions are admitted with the exceptions set out.

Mr. Phillips: Thank you.

(The depositions above referred to, marked as Pre-Trial Exhibits 32, 33, 34 and 35, were received in evidence.)

Mr. Phillips: Call Mr. Tillman. [5]

MEARL C. TILLMAN

one of the Plaintiffs herein, was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. Mr. Tillman, you are a plaintiff in this case, I believe? A. Yes, sir.

Q. Where do you live, Mr. Tillman?

A. 819 North Marine Drive.

Q. How long have you lived in Oregon?

A. Sir?

Q. How long have you lived in Oregon?

A. That would be about 46 years.

Q. In 1948 by whom were you employed?

A. The Sheriff's office, Multnomah County.

Q. In what capacity?

A. Captain in the Uniform Division.

(Testimony of Mearl C. Tillman.)

Q. In April and May, 1948, what was your district?

A. I was Captain in charge of Vanport Precinct.

Q. Are you an owner of property in District No. 2, Drainage District No. 2, in Multnomah County, Oregon? A. Yes, sir.

Q. How long have you been an owner of property?

A. I bought that property in May, 1945.

Q. Were you present at the time of the breaking of the ring [6] dike and levee—can't you hear me?

A. No.

Q. Were you present at the time of the breaking of the dike and the ring levee which surrounded the underpass on Denver Avenue in May of 1948?

A. Yes, sir.

Q. Had you at any time inspected that ring dike around the underpass?

A. No, I can't say that I inspected that except after the flood. After Vanport had been flooded, then I did notice it once, but prior to that time, no.

Q. That was at the time that the water was up against it?

A. Against Denver Avenue, yes.

Q. That was when you inspected it. Now, what was the situation along Denver Avenue at that time, from the 30th of May until—can you tell us when it was? I believe it is stipulated in the pre-trial order, but do you know when the original break occurred in District No. 2, or about what time?

A. I wasn't on Denver Avenue when it went through Denver Avenue, if that is the question, sir.

(Testimony of Mearl C. Tillman.)

Q. Do you know how long it was from the time that the original dike broke in District No. 1 until the dike broke up at Denver Avenue? Do you know how long a time that was?

A. I think we figured that it was about 30 hours, sir.

Q. Where did the Denver Avenue obstruction to the water break? [7] A. Denver Avenue?

Q. Yes.

A. At almost the center of the fill at the entrance to Vanport.

Q. That would be what we have been referring to as the ring dike? A. Yes, sir.

Q. Were there any other breaks on Denver Avenue with the exception of that ring dike?

A. There was a leak below or south of the ring dike about, oh, I would judge approximately 75 feet, and that was stopped prior to the time that it went through Denver Avenue.

Q. What effect did this break have on your property? A. A complete loss.

Q. I don't mean that. Was it flooded? That is, was your property one that was flooded?

A. Yes, sir.

Q. Were there any other dikes or dividing lines between District No. 1 and Drainage District No. 2 except Denver Avenue and that ring dike?

A. Not to my knowledge; no, sir.

Q. Do you know? A. There wasn't.

Mr. Phillips: I think that is all. [8]

(Testimony of Mearl C. Tillman.)

Cross-Examination

By Mr. Lowry:

Q. Mr. Tillman, where was your property located with respect to Union Avenue? Was it east or west of Union Avenue?

A. It is east of Union Avenue, north and east.

Q. That means, then, that before your property was actually flooded Union Avenue, too, had to fail; is that right? A. That is right, sir.

Q. I am not sure I understood whether you said you were present when the ring levee failed or not.

A. I was on the job, sir, but not on Denver Avenue at the time that it broke.

Q. I believe you said that you acquired your property in May, 1945? A. Yes, sir.

Q. At the time you acquired your property the underpass under Denver Avenue had already been constructed, had it not? A. Yes, sir.

Q. And the ring levee had already been constructed? A. Yes, sir.

Q. At any time, Mr. Tillman, prior to when the ring levee failed on May 31st, 1948, had you ever made any protest to any representative of the United States about the condition of the underpass or the ring levee? A. No, sir. [9]

Mr. Lowry: That is all.

(Testimony of Mearl C. Tillman.)

Redirect Examination

By Mr. Phillips:

Q. Why did you not make any protest, Mr. Tillman?

A. At the time that it was constructed I didn't own property there, sir, and after 1945, why, I just hadn't made any complaint as to the strength of the circle, sir; that is, to the Government. I have talked to individuals, but not to the Government, sir.

Mr. Phillips: That is all.

Mr. Lowry: Thank you, Mr. Tillman.

(Witness excused.) [10]

F. R. SCHANCK

was produced as a witness in behalf of Plaintiffs, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. Mr. Schanck, to what profession do you belong? A. Civil engineer.

Q. How long have you been a civil engineer?

A. More than 40 years.

Q. Where did you receive your schooling?

A. Stanford University.

Q. Are you a registered licensed civil engineer of the State of Oregon? A. Yes, sir.

Q. Have you had any particular experience with

(Testimony of F. R. Schanck.)

the building of dikes or dams or earthworks, and things of that kind and nature; and, if so, what?

A. Both dikes along rivers and canals, built of various materials, which require the same kind of analyses. I have built dikes along the Colorado River, Arizona, the Kansas River in Kansas, the Missouri River, the Yakima River in Washington, and at one time I was engaged by the Army Engineers here to advise them on the river protection work they were doing on the Willamette and the Santiam and a couple of rivers in Washington, and have had experience with the Navy during [11] this last war. I was engineer in the Bureau of Yards and Docks, which builds shore establishments, in Puerto Rico, the British West Indies, and the eastern United States. The matter of the use of materials to withstand water was one that I had to do with.

Q. Have you prior to this time made a study, Mr. Schanck, of the pre-trial order and the dimensions and construction of the Denver Avenue fill and the ring levee, together with the cut?

A. I have.

Q. Have you studied the elevations and the cross-sections? Have you made a study of that?

A. Yes, sir.

Q. Are you at this time acquainted with the construction of Denver Avenue and of the ring levee in May, 1948, and prior to that time?

A. I am, as described in that pre-trial order.

Q. Now, in your opinion, Mr. Schanck, what would the Denver Avenue fill do to prevent water

(Testimony of F. R. Schanck.)

from coming from the west to the east between Drainage District No. 1 and Drainage District No. 2? What would that act as?

A. It would act as a dike to prevent water flowing from the west to the east up to the limit of the height of the Denver Avenue fill.

Q. From the construction of that fill as it was at that time, [12] what would you say as to its ability to prevent floodwaters coming from the west to the east had it not been for the underpass that was cut there, as you know it?

A. The Denver Avenue fill should have withheld the maximum water that did occur during the flood of 1948.

Q. Now, in comparison with the Denver Avenue fill, what would you say as to the construction, the way it was constructed, the manner it was constructed, the height, the width and all that, of that ring levee in comparison with the Denver Avenue fill as a block to water coming from the west to the east?

A. The so-called ring levee I would not consider adequate to have withstood a flood even considerably lower than the one of 1948.

Q. For what reason? Why do you say that?

A. The material of which it was built was not one that readily consolidated with any cohesion to resist water. The slope of the bank, especially the east slope, was too steep to probably stand after it became saturated with water and the water acted

(Testimony of F. R. Schanck.)

as a lubricant to permit the material to slide. And then the form of the ring dike——

Q. What do you attribute to the form? Will you explain that, please.

A. The fact that there was a pocket in the underpass, where water coming from the west would acquire velocity as it flowed in to fill that further pocket, would cause a very much greater [13] erosion and would be very much more apt to erode than if it had been a straight continuation of the Denver Avenue fill, because the erosion, the eroding power of water, increases very rapidly, probably to the sixth power of velocity, so that the water instead of just being slowly rising against the face was flowing along the face of the ring dike, as it must have to have gotten in there. This erosion would have been very much greater, and therefore the ring dike should have been constructed more substantially than if it were a part of the straight Denver Avenue fill.

Q. The fact that that was formed in what we call a ring, would that in any way affect the erosion or the current of the water coming through the cut?

A. Yes. The pocket of the underpass formed as I said, the water had to flow in there, not just rise gradually, so that it would have a velocity along the face of the ring dike, and there would be a certain amount of turbulence which would greatly increase the erosion effect.

Q. Now, Mr. Schanck, I believe it is admitted and agreed that there was a clay blanket placed on

(Testimony of F. R. Schanck.)

the east side of this ring dike. Would that have any particular effect on any erosive power of the water coming from the west to the east in any way?

A. Not the comparatively thin blanket that was put on there. If it had been heavy enough to have acted as a dike all by [14] itself, it might have resisted, but that thin blanket would just fall in. The loose sand that the west face was built from would be carried away, and the clay blanket just would fall into the water, I assume.

Mr. Phillips: That is all.

Cross-Examination

By Mr. Lowry:

Q. Mr. Schanck, I gather from what you say that you have had some experience both with the design and the construction of levees?

A. Yes, sir.

Q. Would you say that the determination of the proper design and construction of a levee calls for the exercise of judgment on the part of the engineer?

A. Yes, sir.

Q. And I take it there might be reasonable differences of opinion between competent engineers as to what in any given situation a proper design of a levee might be?

A. Yes, within certain limits.

Q. I think you suggested in one of your answers that the Denver Avenue fill might be considered a dike. The fact is, is it not, that under the circumstances stated in the pretrial order there would be

(Testimony of F. R. Schanck.)

no water against the Denver Avenue fill in the absence of a failure of one of the primary levees? [15]

A. I don't know that I understand what you mean by "primary levees."

Q. By "primary levees" I am referring to levees which in the normal course of high water would have water against them. Now, in the normal course of high water Denver Avenue would have no water against it, would it?

A. You mean if no other dikes broke?

Q. That is right. A. I think not.

Q. So that Denver Avenue would act as a dike, if at all, only in the event there was a failure of some other levee? A. Yes.

Q. What has your experience, Mr. Schanck, been in connection with culverts through highway fills when water comes up against a highway fill and creates a considerable head? Do you understand my question?

A. I don't know what you are aiming at.

Q. Mr. Schanck, does the engineering profession recognize that if there is a culvert through some such structure as Denver Avenue that that sometimes is troublesome when water gets up against the fill?

A. It depends upon how the culvert is installed. A culvert installed with adequate collars and external surfaces to prevent water from following it through, it shouldn't be the cause of any trouble. That is, I mean the dike shouldn't [16] fail there, or

(Testimony of F. R. Schanck.)

the fill shouldn't fail there more than any other place.

Q. Is there anything in the pre-trial order that indicates that any such collars were installed around the culvert which was under Denver Avenue?

A. What culvert are you talking about?

The Court: Counsel, you are asking about the pre-trial order. You are probably better acquainted with it than the witness is.

Mr. Lowry: I will withdraw the question.

Q. When you suggested that Denver Avenue might serve as a dike, did you have in mind that it had a culvert roughly five feet by five feet through it?

A. An open culvert?

Q. No, I think the culvert was plugged. I am only asking you what you had in mind when you answered the question.

A. I was considering the height and the width and the slopes of the Denver Avenue fill.

Q. And you did not give consideration to the culvert that runs through Denver Avenue?

A. No.

Q. Mr. Schanck, it is true, is it not, that when a fill or earthen embankment is exposed to water of a considerable height suddenly and without prior seasoning by other exposures to water the conditions are adverse from the point of view of the [17] strength of the embankment?

A. Yes, it should be built with that in mind, that it may be exposed suddenly.

Q. And of course, Denver Avenue, under the cir-

(Testimony of F. R. Schanck.)

cumstances which are assumed in the pre-trial order, was exposed to water very suddenly, was it not?

A. You mean it had never been exposed to water before? I think it had been.

Q. In answering the question that Counsel put to you as to whether or not Denver Avenue might be expected to act as a fill, as a satisfactory dike, did you assume that Denver Avenue had been exposed to water pressures on a number of occasions in the past? A. I didn't take that into account.

Q. Either one way or the other? A. No.

Q. But it is true, is it not, that a sudden exposure to a high head of water puts a severe strain upon an earthen embankment if it has not previously been exposed to water pressure?

A. You mean if it is not consolidated it is more apt to fail than if it is?

Q. No. What I have in mind is this: I understand that in normal levee construction and design work you anticipate that the water will come up against the levee gently as the river rises, and on numerous occasions very likely before you get [18] the maximum flood. Now, I also understand——

A. I never designed one that way.

Q. Let me see if I can just get an answer to my question. Would you consider that a levee which had never been exposed to water pressure before and received the pressure of water of a hydrostatic head of perhaps 20 feet, was being tested under severe conditions?

A. You mean under abnormal conditions?

(Testimony of F. R. Schanck.)

Q. Yes, conditions which are likely to put a severe strain upon the levee? A. Yes.

Q. In discussing the ring levee, you referred to the fact that it was composed of material which I think you suggested did not readily compact. You have in mind that it was built of sand in part?

A. That is what I understand was used.

Q. Sand is very frequently used in the construction of levees, is it not?

A. It depends upon certain circumstances. If it is available in adequate quantities and is of a suitable kind—sands have very different characteristics, both wet and dry.

Q. But sand is, generally speaking, frequently used in the construction of levees?

A. Yes. It is usually the most easily available.

Q. You spoke, Mr. Schanck, of an erosion problem because of [19] the fact that this levee was semi-circular. Of course, that problem would not arise had the water come from the other direction, would it? That is, if the water had come from the east moving toward the west, there would have been no erosion problem?

A. There would have been a less amount along each of the faces as they went towards the Denver Avenue dike at right angles, as they approached the 90-degree angle from the axis of the Denver Avenue dike; not as much as there was here.

Q. Do you know anything about the circumstances under which the ring levee failed, Mr.

(Testimony of F. R. Schanck.)

Schanck? I don't mean to mislead you. What I really want to know is, do you have any way of saying whether or not erosion contributed to the failure that took place?

A. I would say almost surely that erosion did have something to do with it, because if there had been no current whatever against the face of that, there is just a bare possibility that it might have held. Now, erosion, of course, comes from any movement of water, either vertically or horizontally, and it is what usually starts the failure of any structure of that kind.

Q. By erosion you would mean in this case erosion of the inside surface of the ring levee?

A. Erosion where the water was, yes.

Q. You have no personal knowledge of the circumstances [20] under which that levee failed?

A. No. I wasn't there.

Q. So you don't know one way or the other whether there was any evidence at the time of the failure of any effect of erosion; that is, of your personal knowledge? A. No, I don't.

Q. What you have told me is that you are fairly confident from what you know about levees generally that that probably had an effect? A. Yes.

Mr. Lowry: That is all.

(Testimony of F. R. Schanek.)

Redirect Examination

By Mr. Phillips:

Q. Mr. Schanek, no matter what you call Denver Avenue—a dike, highway, or what not—it still would be a block and protection to District No. 2, to prevent water traveling from the west to the east, wouldn't it? A. Yes, sir.

Mr. Phillips: That is all.

(Witness excused.)

(Short recess.) [21]

THOMAS G. DONACA

was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. Where do you live, Mr. Donaca?

A. 444 Northwest Maywood Drive.

Q. Portland, Oregon? A. Yes, sir.

Q. How long have you lived in Oregon?

A. 60 years.

Q. You have been in varied businesses in Oregon since you have lived here?

A. Mostly the real estate business.

Q. Did you have any connection or official ca-

(Testimony of Thomas G. Donaca.)

capacity with Drainage Districts Nos. 1 and 2; and, if so, during what period of time?

A. I was supervisor of Peninsula Drainage District No. 2 since 1937, and a supervisor in Peninsula Drainage District No. 1 since 1938. And I think I was secretary of each of them for a while.

Q. Were you also a property owner in each district? A. In both districts.

Q. Now, in 1928, Mr. Donaca, I believe District No. 2 was reorganized; is that correct? [22]

A. That is my understanding.

Q. Under that reorganization was there any separation of the Districts and, if so, why?

A. It was my understanding that they separated Districts Nos. 1 and 2. I got that only from what the attorneys have told me and the engineer for the Districts. I never read the records myself.

Q. From your own experience, without any hearsay, when the two Districts were separated, what was the dividing line? A. Denver Avenue.

Q. At that separation, was there a change in the drainage system of each District?

A. Not at that time. There was a change later.

Q. When was that and what was it?

A. I think the actual change came about 1941.

Q. What was that change?

A. Previous to 1941, the water from both Districts drained to a pump in District No. 1. The U. S. Army Engineers raised the dikes on Peninsula No. 1, I think it was in 1940, and in 1941 they raised them in Peninsula No. 2. And at that time a pump

(Testimony of Thomas G. Donaca.)

was put in Peninsula Drainage District No. 2, a separate pump, and Peninsula Drainage District's water drained to the pump that was in Peninsula Drainage District No. 2.

Q. The only actual connection between the two Drainage Districts, then, as I understand it, was physically what? A culvert, [23] or something of that kind, with one pump?

A. There was a culvert under Denver Avenue previous to the time it was plugged.

Q. Were the two Districts ever joined or did they ever have any connection with each other otherwise than that physical connection?

A. Financially or physically, no.

Q. They were separate and distinct drainage districts? A. Separate districts.

Q. What was the dividing line—I believe you testified it was the Denver Avenue fill?

A. Denver Avenue.

Q. Was there any other western dike or protection from water coming from the west in Drainage District No. 2 than Denver Avenue?

A. Not for Peninsula Drainage District No. 2 itself, no.

Q. That was the western district. Now, what about the Union Avenue fill?

A. We never considered that a dike. It had a five-foot culvert through it which never was plugged. As a matter of fact, it had an underpass built by the State Highway Department, through Union Avenue.

(Testimony of Thomas G. Donaca.)

Q. Was that any protection from water coming from the west to your District, any part of your District?

A. No protection whatever, either way. [24]

Q. What would you say about Denver Avenue and the ring levee?

A. Why, I assumed that the ring levee was a protection.

Q. Did you have any other independent protection for your District No. 2? A. No.

Q. Were you present during 1948 when the ring levee gave way?

A. Not at the time it gave way.

Q. Were you there prior to that time?

A. Yes.

Q. Did you observe the situation there?

A. I did.

Q. Will you describe just what you saw and what happened?

A. Well, the water, of course, was as high, I think——

Q. First, may I interrupt you and ask you a question. Where did the water come from that came up against the ring levee? A. From the west.

Q. How did it get through Denver Avenue?

A. Broke the ring levee.

Q. How did it get through the Denver Avenue fill? How did the water get through the Denver Avenue fill? A. You mean the floodwater?

Q. Yes.

(Testimony of Thomas G. Donaca.)

A. The only way I know, it went through that levee.

Q. Was there an underpass there?

A. There was, yes. [25]

Q. Did you have anything to do with the water coming through Denver Avenue?

A. Well, that was where the dike broke.

Q. That is, the ring levee broke at the underpass?

A. That is right.

Q. Now, let's leave the ring levee out of it. Referring particularly and specially just to the Denver Avenue fill itself, how did the water get through there? A. I don't understand.

Q. You don't understand my question. Well, I will ask you this: Did the water come through the cut there at the underpass before it hit the ring levee? A. Oh, yes. That was open.

Q. That is what I thought. Now, did the water get through Denver Avenue anywhere else, or did you get any water that came from anywhere else onto Drainage District No. 2 except through that underpass and the ring levee?

A. Yes. The original culvert, I guess you would say, it broke out. The plug in the culvert broke out, and that was leaking very, very badly.

Q. What eventually happened to that?

A. They finally got that plugged by using——

Q. Was that before or after the ring levee broke?

A. That was before. There was some seepage through the dike, through Denver Avenue at the

(Testimony of Thomas G. Donaca.)

north end, but that never went [26] out. There was a pipe under the ring levee.

Q. Yes, I will come to that presently. Now, prior to the break, were you on the ring levee?

A. I was all around there, yes.

Q. Answer my question. Were you on the ring levee?

A. Yes, I was on there.

Q. What did you observe as to a leak around a particular pipe or manhole? Just describe what you saw there and what happened.

A. I never knew there was a pipe under there.

Q. Where was it, then? Tell us that.

A. It was about, I would say, two-thirds of the way to the north end of the ring levee. At the time I saw it, Mr. Dibblee and I were standing there.

Q. Who? A. Mr. Ken Dibblee.

Q. Who is he?

A. A U. S. Army Engineer. And the thing just blew out, as far as I could see.

Q. What do you mean, the thing blew out?

A. I mean the water came up there in a geyser like. It was coming through the dike. I didn't know there was a pipe through there. It looked like it was coming right through the dike. We attempted to——

Q. Did you find out where the water was coming through, or what it was coming through? [27]

A. I never knew until after the flood it was a pipe. We attempted to plug it with—we attempted to block that water from coming through there with sandbags, but the geyser was so high, so strong, they would throw sandbags in there and they would just

(Testimony of Thomas G. Donaca.)

go out to one side. That was right at the foot of the dike, or the ring levee—the ring levee.

Q. Where was the water coming up in the geyser from?

A. On the inside of Peninsula Drainage District No. 2, and then later it was coming through this pipe. I didn't know at that time there was a pipe through there.

Q. Was there a manhole that had any connection with it there?

A. I never knew there was a manhole there until after the flood.

Q. Was there any water coming up through that?

A. That is the water that was coming through there I am trying to describe.

Q. If I get your testimony correctly, the water came through a pipe and up through the manhole in a geyser; is that correct?

A. That is right. The only thing I am trying to explain is that I didn't know whether it was coming through the pipe or coming through the dike at this time.

Q. You learned later that it was a pipe?

A. That is right.

Q. Now, it was coming from which direction?

A. Coming from the west to the east, from Peninsula No. 1 [28] to No. 2.

Q. And up through a manhole?

A. Yes. I found later it was, yes.

Q. I don't know whether I asked you this or not: Did you have or did you consider that you had any

(Testimony of Thomas G. Donaca.)

other protection save and except that Denver Avenue fill from the west for your Drainage District No. 2?

A. The Peninsula Drainage District itself had no other protection.

Q. Was there any other thing that you did or could have relied on to protect you from water coming from the west?

A. No, except hope that in the other District the dikes would hold. That is all.

Q. Did you ever protest about the building of this ring levee or the cutting of the underpass through Denver?

A. As Supervisor of the Drainage District I did.

Q. Did you personally?

A. I did personally.

Q. To whom did you protest?

A. Oh, there was a lot of discussion at that time over the thing with the Highway Department and the Army Engineers.

Q. Now, in so far as that ring levee was concerned, did you have any reason to doubt, prior to the time of the flood, but what that was a good protection to your District No. 2?

A. Well, I had understood that it was under the supervision [29] or with the approval of the U. S. Army Engineers, and if they approved it, approved the rest of the dike, I was satisfied.

Mr. Lowry: I move to strike that answer on the ground it is hearsay, your Honor.

(Testimony of Thomas G. Donaca.)

The Court: Stricken.

Mr. Phillips: I think that is all.

Cross-Examination

By Mr. Lowry:

Q. Mr. Donaca, I wonder if you could tell us in a little more detail what happened at the site of the culvert where the plug blew out. Were you present?

A. I was present there, yes.

Q. That was a large culvert?

A. I think it was a five-foot culvert, if I am not mistaken. Water was going through there, oh, in a big volume, and there was a very great effort to plug that place. They were throwing a lot of gravel in there, hauling straw, and they finally got quite a lot of metal airplane strips, or whatever they were, and threw those in there and threw gravel back on that. Part of the dike went out there.

Q. You are talking about Denver Avenue, itself, now?

A. I am talking now about Denver Avenue, itself.

Q. This culvert was 75 to 100 feet south of the Denver Avenue underpass? [30]

A. I think it is farther south than that.

Q. You give your opinion.

A. I would say it was five or six hundred feet south, anyway.

Q. So this culvert through Denver Avenue itself was not in any way connected with the underpass or the ring levee? A. None whatever.

(Testimony of Thomas G. Donaca.)

Q. Do I understand that Denver Avenue itself started to slough into the culvert because of the action of water going through the culvert? Did the banks begin to cave?

A. You are talking about the five-foot culvert?

Q. Yes, sir.

A. Yes, they caved on the west side where the water was coming from. It was cutting in there. I didn't see any caving on the east side or washing on the east side.

Q. This caving was substantial, was it?

A. Yes, it was very substantial.

Q. I take it if it had not been stopped, Denver Avenue itself would have failed right there?

A. I think that is right.

Q. Perhaps you could tell me about how long did the water flow through the culvert before the efforts to stop it were successful?

A. Well, it would only be an estimate. I would say several yards; five or six yards, anyway.

Q. Now, I think you mentioned some seepage through Denver Avenue, [31] itself, up toward the north end?

A. That is right.

Q. Would you tell me in a little more detail about the seepage.

A. Well, it wasn't serious, as far as I could see, but the Highway Department had bulldozers there—I mean a crane or shovels there, and were putting more dirt along the side of the dike.

Q. Were they sandbagging the side of the dike, do you remember?

(Testimony of Thomas G. Donaca.)

A. I didn't notice any sandbagging there. That is, I don't remember it.

Q. I think you stated you were not present on the ring levee when it finally failed?

A. I was not.

Q. This gusher of water that you have been describing, how far out from the toe of the ring levee did that appear?

A. Well, it seemed to me very close. We tried to throw sandbags into it, and we couldn't have thrown those sandbags very far.

Q. A few feet, perhaps?

A. I would say a very few feet; maybe four or five feet.

Q. How long did that water flow before the ring levee failed, do you know?

A. No, I don't know. Quite a little while.

Q. Mr. Donaca, you said something about protests on account of [32] the construction of the Denver Avenue underpass. I would like to know what you did about that, personally, as opposed to what somebody else did.

A. Well, as Supervisor, we wrote a letter protesting it. I was at the meeting. I can't tell you exactly what I did. I remember that it disturbed us all for some time.

Q. Was this letter that you talk about addressed to the Oregon State Highway Department?

A. The Highway Department.

Q. Was this letter written by Mr. Phipps?

A. Yes, I think so.

(Testimony of Thomas G. Donaca.)

Q. You cannot now recall any more detail about this than you have already given me, about your own conduct in this connection?

A. No definite time. I remember at that time we were working with the Highway Department—or with the U. S. Army Engineers in both 1 and 2, and most everything that had to do with dikes in any way we took up with the U. S. Army Engineers.

Q. You are talking about what you did yourself?

A. Talking about what I did as a Supervisor and personally.

Q. Do you recall now with whom in the Army Engineers you discussed this problem?

A. Our discussions were usually with Mr. McKenzie, G. K. McKenzie. [33]

Q. Do you recall any specific conversation with Mr. McKenzie? A. I do not.

Q. Mr. Donaca, in connection with the protection which District No. 2 had from water coming from the west, it is true, is it not, that the effective protection provided to District No. 2 was the levees of District No. 1?

A. I don't think that people in Peninsula No. 2 considered the protection from No. 1 protected No. 2.

Q. I was just trying to find out about the physical fact, and that is that the floodwater was held away from District No. 2 as far as the western approach was concerned by the levees of **Peninsula Drainage District No. 1**, was it not?

A. It was held away from Denver Avenue; that is right.

(Testimony of Thomas G. Donaca.)

Q. So that in the absence of some failure of Peninsula Drainage District No. 1 levees there would not be any water against Denver Avenue?

A. That is right.

Q. Mr. Donaca, at the time of the flood were the representatives of Peninsula Drainage District No. 2 active in participating in the flood fight?

A. I was there from Thursday afternoon to Sunday night.

Q. Did the District do anything about the flood fight in addition to having you and your associates present?

A. Well, they did all they could, I guess.

Q. Did you furnish some equipment, for example, and some [34] material?

A. Lots of it.

Mr. Lowry: That is all.

Redirect Examination

By Mr. Phillips:

Q. Mr. Donaca, counsel asked you about the protection from District No. 1. Did District No. 2 have any control over District No. 1? If it saw fit to flood District No. 1 or cut their dikes, or anything, was there any way District No. 2 could have prevented that? A. None whatever.

Q. If they had done so, would you have had any protection whatsoever except Denver Avenue?

A. No.

Q. Mr. Donaca, you were speaking about this

(Testimony of Thomas G. Donaca.)

culvert. Do you know who plugged that culvert, that five-by-five culvert?

A. It was my understanding the contractors on each District plugged the end of the pipe in which District they were working.

Q. What contractors are you speaking about?

A. I didn't hear you.

Q. What contractors are you speaking about?

A. Well, the contract let by the U. S. Army Engineers to strengthen the dikes in Peninsula No. 1 and the contractor [35] who had the job on Peninsula No. 2.

Q. That is, the culvert you are speaking of that was effectively plugged, did water stop coming through there at the time of the flood that you described?

A. That is right.

Q. That is not the pipe you were speaking of?

A. No, that is not the pipe.

Q. What kind of a pipe was that you were speaking about?

A. I found later it was a cast-iron pipe.

Q. About how big? Do you know how big it was?

A. 16 or 18 inches.

Q. It went clear through the dike?

A. Yes.

Mr. Phillips: That is all.

Recross-Examination

By Mr. Lowry:

Q. Mr. Donaca, you said that you understood that the plugging of the Denver Avenue culvert was

(Testimony of Thomas G. Donaca.)

done by contractors working for the Army Engineers. Do you personally know anything about it?

A. No, I don't. I was told that.

Mr. Lowry: I move, your Honor, that the answer in that connection be stricken on the ground that the witness knows nothing about it. [36]

The Court: It has gone in. I am going to leave it there. Obviously, I won't give it any weight.

Mr. Lowry: All right, your Honor. May I just say, your Honor, that we have on our part no such information.

Mr. Hess: The only thing is we would like the record to show that we move to strike it on the ground that it is hearsay testimony.

The Court: I heard you.

Mr. Lowry: Thank you.

Mr. Phillips: Thank you, Mr. Donaca.

(Witness excused.) [37]

CLINTON S. MCGILL

was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. Where do you live, Mr. McGill?

A. 7300 Northeast 33rd Drive.

Q. What business are you in?

A. Contractor, general contractor.

(Testimony of Clinton S. McGill.)

Q. Were you ever employed by the Portland Housing Authority? If so, when?

A. I was employed by the Portland Housing Authority from about 1943 until 1951.

Q. In what capacity?

A. Maintenance engineer.

Q. Who was your immediate superior?

A. Well, at what period of time?

Q. Just prior to the time of this 1948 flood.

A. Prior to the time of the '48 flood?

Q. Yes. A. That was Mr. Taylor.

Q. Were you acquainted with a man by the name of Mr. Peirson or with Mr. Byers?

A. I am.

Q. What positions did they hold? [38]

A. Mr. Byers was a maintenance engineer for the Portland Housing Authority up until about 1945, I think. From 1941 to 1945, or about that period.

Q. Who was Mr. Peirson?

A. Mr. A. A. Peirson was the regional engineer in charge of the construction and operation of this District under Mr. Crutsinger of Seattle.

Q. I didn't get that last.

A. He was regional engineer in charge of construction in this area under Mr. Crutsinger of Seattle.

Q. What organization was that?

A. Federal Public Housing Authority.

Q. In relation to your position was Mr. Peirson one of your superiors?

(Testimony of Clinton S. McGill.)

A. Previously he was. I worked for Mr. Peirson, and later I worked jointly for Mr. Peirson and the Portland Housing Authority, and then went over with the Portland Housing Authority.

Q. Did you have anything to do with the original construction of the ring dike or the ring levee or the underpass yourself? A. I did not.

Q. You came there after that time, did you?

A. That is right; yes, sir.

Q. Now, at any time prior to the time of this 1948 disaster did you personally make an inspection of that ring levee and dike? [39]

A. Yes.

Q. Just explain what you did in connection with that and when that was?

A. Well, it was probably, oh, two or three years—probably '45 or '46 the top of the dike started opening up with large cracks in several places around the top edge of the ring dike, because the erosion, the normal erosion, had caused the dirt to slide down, which was at a very steep slope on the east side of the ring dike.

Q. On which side?

A. The cracks were in the top. The slippage was on the east side of the ring dike.

Q. What, if anything, did you have to do with that, or what did you do about it?

A. Well, as I remember, Mr. Byers told me that he was going to find out if he could whether or not this dike was a standard dike.

(Testimony of Clinton S. McGill.)

Mr. Lowry: Your Honor, I move to strike that answer on the ground that it is hearsay.

Q. (By Mr. Phillips): Just tell us what you did about it.

The Court: Yes, the answer is stricken.

A. Well, Mr. Byers and I went down there and looked at the cracks in the dike, and so forth.

Q. What I want is, did you have anything personally to do with it? [40]

A. We repaired it eventually.

Q. What did you have personally to do with the repair of the dike?

A. Well, after the conversation we——

Q. What conversation? Who had the conversation?

A. Well, that was a conversation between Mr. Byers and Mr. Peirson about whether or not they would fix it.

Q. Then what part did you have in it? What you did personally is what we want; not what somebody told you.

A. We eventually dumped those cracks full of dirt and raked them over so they wouldn't be any hazard to anybody that walked around the top of the dike.

Q. Did you get any estimate for the doing of that work?

A. Yes, we had an estimate from Joplin & Elvon for repairing the dike proper and bringing it up to standard.

Q. Did you do that personally?

(Testimony of Clinton S. McGill.)

A. I personally did that.

Q. Was your idea and your plan carried out?

A. No, it wasn't.

Q. Why not? Who stopped that?

A. It was turned down by Mr. Peirson.

Q. By whom?

A. Mr. A. A. Peirson, the Regional Engineer.

Q. Did you talk with Mr. Peirson personally about that?

A. To some extent, yes; nothing official. [41]

Q. How about the repairs to the dike?

A. Yes. He made the remark to me——

Q. Now wait a minute. You said he was not talking officially. Was the dike repaired in compliance with your ideas and the estimate that you had gotten?

A. It was not.

Q. What was the difference?

A. About eighty-five hundred or nine thousand dollars.

Q. No, I mean the repairs that you recommended and got bids for, what was the difference in that plan that you had and the plan that was followed eventually? Do I make myself clear?

A. Well, the dike was never brought up to standard. We merely filled the cracks and raked them over. That is all.

Q. What was your plan?

A. Well, you mean when I was requested to get the estimate for the repair of the dike?

Q. Yes. Did you do that?

(Testimony of Clinton S. McGill.)

A. I got an estimate on it, but the job was, as I say, turned down.

Q. Did you have any plan as to what was going to be done if you could get your estimate?

A. No. Mr. Byers handled that.

Q. So you don't know what they were going to do under your plan?

A. That is right. All I know was the conversation I heard [42] between Byers and one of the engineers that they would get a certain amount of fill dirt in there to bring it up to standard.

Q. Was it a part of your job to inspect this dike? A. Yes.

Q. Did you do so? A. Yes, we did.

Q. Do you know when or where that 18-inch pipe was put through the ring dike?

A. Well, I couldn't say as to the exact size of it. Are you referring to the one where the catch basin is drained through under the ring dike and the manhole?

Q. That is correct. A. Yes.

Q. Do you know where that was and what it was?

A. Yes, it was pretty well down towards the bridge in the ring dike.

Q. Can you tell us what that construction was, how it operated and how big that pipe was?

A. I couldn't tell you. It was quite a large pipe, say from 12 to 18 inches. It could have been 18 inches. I don't know.

Q. Did it have any floodgates on it?

(Testimony of Clinton S. McGill.)

A. I think—I don't remember. Honestly, I don't. I know it ran down to the manhole on the east side of the ring dike.

Q. Where did it start from? [43]

A. That took off a certain amount of surface water that came down the roadway going into the circle of Vanport.

Q. And drained into District No. 2?

A. That is right.

Q. You don't know whether it had any flood-gates or not? A. I don't remember that.

Q. Were there any other systems or pipes or anything put along that ring dike or in that ring dike?

A. Well, we found out after the flood that there was one through there.

Q. Was there any water pipes put in there?

A. Yes. The water main to East Vanport ran over the top of the ring dike and through the underpass and down into East Vanport.

Q. You say the ring dike was repaired but not under the bid or the idea that you had. What was done to repair that ring dike?

A. As I say, all we did was to haul in dirt and fill the cracks to eliminate any hazard there.

Q. I believe you said that it was a hazard. What did you mean by that?

A. Well, these cracks, some of them, were pretty wide; six or eight inches wide.

Q. How wide would you say they were?

A. I would say some of them were six or eight

(Testimony of Clinton S. McGill.)

inches, maybe [44] more, and some of them were way down deep in the ground.

Q. How deep would you say?

A. Oh, six or eight feet; maybe ten feet. They were narrow wedge-shaped cracks.

Q. Were you there at the time of the flood?

A. Yes, sir.

Q. Were you around that ring dike prior to the flood, prior to the time that it broke?

A. Yes, I was.

Q. Where did the water come from that came through Denver Avenue?

A. It came from Vanport.

Q. How did it get through Denver Avenue?

A. It broke the ring dike between the bus loading station and about halfway south of that.

Q. Did you see anything in connection with the break in the ring dike yourself? Did you see the ring dike prior to the time it broke?

A. Yes, sir.

Q. Where did you see it?

A. I was on top of it about 20 minutes before it broke.

Q. In reference to this 18-inch pipe running from the east to the west, draining from the east to the west, what was occurring there at that pipe?

A. Inside the ring dike on the east side of the bridge, the [45] Denver Avenue Bridge, there was a very definite large swirl in there, and I don't think anybody could tell where it was—what was going on underneath at all. But the water was going

(Testimony of Clinton S. McGill.)

through at a terrific force, which got larger and larger.

Q. Going through where?

A. Outside the ring dike.

Q. That would be on the east side?

A. That is right.

Q. Was there any water coming through at that time anyplace else on the ring dike except there?

A. Not to my knowledge. Not to my knowledge.

Q. Did you see it?

A. I didn't see it anyplace else.

Q. Would you have seen it if it had been?

A. Yes, I would have.

Q. Then was it? A. There wasn't.

Q. Now, at that 18-inch pipe can you describe, please, what was occurring there. You say there was a swirl there and the water was coming out. Where was it coming out?

A. Coming out at the toe of the ring dike next to the manhole.

Q. Did you attempt to do anything about that?

A. Well, along in the evening there was so much water coming through there it was questionable whether anybody could do anything about it. [46]

Q. Did you try to do anything about it?

A. We did. That manhole was plugged with sand, if I remember right, prior to the trouble we had with this pipe. We plugged it full of hay and sand, to plug the manhole.

Q. That would be the manhole?

A. That is right.

(Testimony of Clinton S. McGill.)

Q. Did that hold? A. It did not.

Q. What happened to it?

A. Well, the pressure, as it got heavier and heavier, it finally blew out.

Q. Blew sideways or out the top?

A. Oh, that I wouldn't know.

Q. Do you know what happened, how it happened to blow out?

A. No, I couldn't tell you.

Q. Now, as to that five-by-five culvert that has been described through the ring dike, what occurred there? Can you describe what happened at that five-by-five culvert?

A. That is not through the ring dike.

Q. I meant through Denver Avenue. Pardon me.

A. That was about, oh, one hundred or so feet south of the south approach into Vanport of the ring dike. When that plug broke loose and the water started up through there, Mr. Sweeney, of Portland Meadows, brought over some baled hay to us, and those bales of hay were dropped into the swirl, and it plugged it [47] temporarily, and then they used airplane runway steel to cover it over, and then we used bank gravel and graveled over the top of that, and it held.

Q. Did that effectively block water from going through there?

A. Effectively sealed it off, yes, sir.

Q. Did it hold until such time as the ring dike went out? A. That is right.

(Testimony of Clinton S. McGill.)

Q. On Denver Avenue itself was there any place that looked to you as though it would give way prior to the time the ring dike did?

A. No, it was in very good condition.

Q. Did you get any water from anywhere except the ring dike; that is, floodwater?

A. Not very much.

Q. Of course, you described some water coming through——

A. Well, a little seepage here and there, but no water of any consequence.

Q. I will reframe my question. After you plugged that five-by-five culvert through Denver Avenue, then did you get any more water into No. 2 except through the ring dike?

A. Except through the ring dike. That is right.

Q. Prior to the time of the flood in '48 there, what was the condition of the east side as to the slope of that ring dike, and what did it look like?

A. Well, from about the center of the ring dike around to the [48] north side, as it swung around to the north side, to the bus depot station there, it was very steep. And the further around you went the steeper it became.

Q. Did you yourself call this condition to anybody's attention, either in writing or otherwise?

A. No. Mr. Don Byers handled that. The engineer who came down and checked it, he could well see that it wasn't up to standard. And he is the one that handled it from there.

Q. What engineer was that?

(Testimony of Clinton S. McGill.)

A. You mean who Don Byers talked to?

Q. From Seattle.

A. Well, the engineer that they had the conversation with was Mr. Peirson.

Q. Now, this water that came through the pipe, what effect did that have on the base of the ring dike?

A. On the face of the ring dike?

Q. On the base; the bottom.

A. Oh, naturally it weakened it.

Q. Did it wash it at all?

A. Well, it must have, because it went out there.

Q. Is that where the break came?

A. That is right.

Q. Through the ring dike?

A. That is right.

Q. At that pipe? [49]

A. That is right.

Mr. Phillips: I think that is all.

Cross-Examination

By Mr. Lowry:

Q. Mr. McGill, were you present when the ring levee failed?

A. No. I just had gone home to—I left the Denver ring dike and had driven from there to 24th and Ainsworth, and just as I walked in the door they called me on the telephone and told me the dike had broken.

Q. So you do not of your own knowledge know where it failed?

A. Only I came right back down there and

(Testimony of Clinton S. McGill.)

could see the cut before it widened out very much, where it had broken.

Q. About how long was that?

A. I was back there in probably 15 minutes.

Q. Well, there was quite a lot of water there then, wasn't there?

A. There were a lot of buildings going through there, too.

Q. So it was widening out pretty fast?

A. You could hear the buildings crushing out many blocks as they went through there.

Q. Now, this water main that you described running over to East Vanport, that of course did not go through the ring levee; it went up over it?

A. It was about four feet deep in the top of the ring levee [50] from the circle in Vanport. That is where they obtained their water from for East Vanport.

Q. Just to fix this precisely, the water main went through the ring levee about four feet from the top?

A. About four feet deep there; that is right.

Q. No trouble developed up there that you know of?

A. That is where it went out, right below the bus station. The water went through just south of the bus station and over and down the side into East Vanport, and that whole section went out there from that point south.

Q. This culvert that you spoke of which ran from the inside, so to speak, of the ring levee out

(Testimony of Clinton S. McGill.)

toward the toe, do you happen to know why that culvert was there? A. No, I don't.

Q. You don't know whether it was to drain that area inside the ring levee or not?

A. What is that?

Q. You just plain don't know? You don't know why it was there?

A. Well, yes, apparently it was there for drainage purposes.

Q. This inspection that you talked about of the ring levee in '45 and '46, I take it as you sit here now you are not absolutely certain what the date was? A. No, I don't remember.

Q. That was the inspection that was made with Don Byers? [51]

A. That is right. It was around '45 or '46.

Q. Did you personally repair that ring levee?

A. Yes, we had the——

Q. I mean you personally.

A. No, no; not personally. We had it done.

Q. So all you know about that is what reports were made to you?

A. No, I was down there at the time they were filling it.

Q. What were they doing at the time you were there?

A. Well, we had some small dump trucks, and we backed them in—it was wide enough to back in on top of the dike, and we dumped the dump trucks and raked those cracks full of dirt.

Q. About how long were you there?

(Testimony of Clinton S. McGill.)

A. Oh, probably Dick Forrest and I were down there a half-hour.

Q. I take it they were working on the ring levee for some days?

A. Oh, no. It didn't take very long to fill those cracks; probably less than a day.

Q. That is all you saw them do, was during that half-hour?

A. That is all we were there, yes, to my knowledge.

Q. Now, the discussion about the repair work that was to be undertaken at the ring levee, as far as you know about it, was between Mr. Byers and Mr. Peirson; is that right?

A. That is right. [52]

Q. And you did not personally participate in that discussion?

A. No. I was there during one of the discussions.

Q. You of course don't know who else, if anyone, considered the question of what repair work should be done on the ring levee? I mean you don't know to whom Mr. Peirson talked in addition to Mr. Byers?

A. No, I don't. It was between Mr. Byers and Mr. Peirson.

Mr. Lowry: I guess that is all.

(Testimony of Clinton S. McGill.)

Redirect Examination

By Mr. Phillips:

Q. Did you yourself talk to any of the Army Engineers concerning the repairs?

A. I did not.

Mr. Phillips: That is all.

(Witness excused.)

(Whereupon an adjournment was taken until Wednesday, August 5, 1953, at 10:00 o'clock a.m.) [53]

Wednesday, August 5, 1953

(Court reconvened, pursuant to adjournment, and proceedings herein were resumed as follows):

Mr. Phillips: Call Mr. Zeidlhack.

FELIX ZEIDLHACK

was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. To what profession do you belong, Mr. Zeidlhack? A. I am a civil engineer.

Q. How long have you been a civil engineer?

(Testimony of Felix Zeidlhack.)

A. Over 40 years.

Q. Are you a registered civil engineer and licensed in the State of Oregon? A. Yes.

Q. With what firm or with whom are you connected?

A. I am a partner of John W. Cunningham, in the firm of John W. Cunningham and Associates.

Q. Have you made a study of this Denver Avenue fill and the ring levee involved in this case?

A. Yes, sir.

Q. You have been here all the time and you have heard the [54] testimony, also? A. Yes, sir.

Q. As to why it was constructed?

A. Yes, sir.

Q. Now, Mr. Zeidlhack, in reference to the Denver Avenue fill what is your opinion as to the ability of the Denver Avenue fill to have prevented water flowing from west to east at the time of this flood?

A. I think it would have been effective, yes.

Q. What effect did cutting that underpass have on the Denver Avenue fill's ability to hold back water?

A. It would nullify the effect of the dike.

Q. Now, the ring dike, do you know about that, also? A. Yes, sir.

Q. From your same experience? A. Yes.

Q. What would you say as to whether or not that ring dike was adequate to hold back water or, in comparison with Denver Avenue, would give the same protection from water coming from the west?

(Testimony of Felix Zeidlhack.)

A. I would say it would not be adequate protection.

Q. Why do you say that, Mr. Zeidlhack?

A. Due to the deficient slopes on both sides.

Q. What would you say as to the width and height?

A. The width at certain places was likewise insufficient. [55]

Q. Would building it in a semi-circle, the way it was, have any particular effect on it as to its adequacy as a dike?

A. It would create currents.

Q. What would that do?

A. Have a tendency to erode.

Q. More so than if the water came up gradually on it?

A. That is correct.

Mr. Phillips: Take the witness.

Cross-Examination

By Mr. Lowry:

Q. Mr. Zeidlhack, have you had some experience in connection with the design and construction of levees?

A. Those particular structures, none whatever.

Q. I was thinking or talking about your experience generally?

A. Oh, yes, yes. We build earth-filled dams and dikes.

Q. Would you say that the problems of the design of a levee are problems which require the exercise of judgment?

A. Absolutely.

(Testimony of Felix Zeidlhack.)

Q. Would you say that the problems relating to the construction of a levee call for the exercise of judgment? A. Yes, sir; absolutely.

Q. I think you said that you have no personal familiarity with the levees and dikes which are under discussion here?

A. During the construction I had nothing to do with it. [56]

Q. Were you present at the time that the ring levee failed? A. No.

Q. In your experience, Mr. Zeidlhack, is it true that culverts through a highway fill frequently cause trouble if water comes up against the highway fill?

A. Not if they are properly designed.

Q. That is, not if they are designed to withstand the pressure of water? A. That is correct.

Q. But if the culvert had only been placed there for drainage purposes and had later been plugged in order to stop the drainage, would you think there would be some possibility then that the culvert might cause trouble?

A. If the plug is effective, I see no reason why it should, and if the culvert is properly designed.

Q. There is a difference, is there not, between designing a culvert from the point of view of providing drainage through a fill and designing it from the point of view of resisting hydrostatic pressure?

A. Yes, it would be designed differently.

Q. And a culvert designed only from the point of view of providing drainage through a fill might

(Testimony of Felix Zeidlhack.)

possibly be troublesome if hydrostatic pressure developed against it?

A. If it is improperly designed.

Mr. Lowry: I think that is all. [57]

Mr. Phillips: That is all.

(Witness excused.)

Mr. Phillips: That is the plaintiffs' case, your Honor. We rest.

Mr. Lowry: We are ready to proceed with the Government's witnesses, your Honor. [58]

KENNETH R. DIBBLEE

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. By whom are you employed, Mr. Dibblee?

A. By the Corps of Engineers, Portland District.

Q. Are you an engineer?

A. I am a graduate civil engineer.

Q. How long have you been doing engineering work?

A. I graduated in 1927, and with the exception of one year I have followed civil engineering during all that time to date.

Q. About how long have you been working for the Corps?

(Testimony of Kenneth R. Dibblee.)

A. I have worked for the Corps continuously since 1936, and I had approximately one year previous to that time in '34.

Q. About how many years of experience have you had in connection with problems relating to levees in one fashion or another?

A. Approximately six and a half years.

Q. About how long have you been familiar with the levees of Peninsula Drainage Districts Nos. 1 and 2?

A. Since 1936.

Q. Mr. Dibblee, do you have any personal knowledge about the construction or maintenance of Denver Avenue?

A. No. [59]

Q. Do you have any personal knowledge about the construction or maintenance of the ring levee?

A. No.

Q. Were you on Denver Avenue on May 30th, 1948?

A. Yes.

Q. Did some trouble develop at the site of the culvert south of the Denver Avenue underpass?

A. Yes, it did.

Q. Would you tell us generally what happened there.

A. Shortly after the failing of the Peninsula Drainage District No. 1 area the plug in this large culvert blew out, and with a considerable head of water against this culvert a large discharge passed through the culvert into Peninsula Drainage District No. 2. Efforts were immediately made by the local interests, and supplemented by the Oregon State Highway Department people, to attempt to

(Testimony of Kenneth R. Dibblee.)

plug the culvert. They worked by throwing bales of hay into the water on the westerly side, hoping the bales would be caught in the culvert. They dumped truckloads of gravel and material, and they worked through the afternoon and evening of May 30th and through until the late afternoon, I believe, of May 31, before they were successful in plugging that culvert. They ultimately did by using some airport steel matting and throwing that out, and with that and other materials they finally accomplished the stoppage of the flow.

Q. By the time the culvert had been plugged and the flow [60] stopped had any part of the fill washed away?

A. Yes, there had been sloughs on the westerly shore immediately above the culvert back into the pavement, even. It sloughed off—the shoulders had sloughed off into the water.

Q. Were you on the ring levee on May 30th, 1948? A. Yes.

Q. Did you see some water gushing out near the eastern toe of the ring levee? A. Yes.

Q. About how far from the toe of the levee was this water gushing from?

A. I estimated it to be between 15 and 20 feet from the toe of the ring levee.

Q. Could you describe for us about how much water was coming out and what it looked like?

A. Well, it appeared from observation at that time that there was a column of water approxi-

(Testimony of Kenneth R. Dibblee.)

mately two feet in diameter, a vertical column of water, that was gushing up from the ground, spilling over and running off into Peninsula Drainage District No. 2.

Q. Was the water running back toward the toe of the levee or away from it?

A. It was not washing against the toe of the ring levee. It was flowing in the other direction, more toward the center of Peninsula Drainage District No. 2. [61]

Q. As far as you could see, was that water having any effect on the ring levee? A. No.

Q. Was there any indication that the water was carrying any material out of the ring levee?

A. No.

Q. At the time you were on the ring levee on May 30th, 1948, did you see any current in the water adjacent to the western side of the ring levee? A. No, I did not.

Q. Did you see any evidence of erosion on the western side of the ring levee? A. No, sir.

Q. Mr. Dibblee, about how long did Denver Avenue hold after the water went up against it?

A. Well, my recollection is that the break in the railroad embankment which allowed the Vanport area to fill up occurred at approximately 4:30 p.m., on the 30th, May 30th, and that the break in the ring levee occurred at about 9:00 o'clock on May 31st.

Q. Then about how long did Union Avenue hold after the water reached Union?

(Testimony of Kenneth R. Dibblee.)

A. My recollection is that Union Avenue broke about 1:00 a.m., on June 1, which would have been about four hours after Denver Avenue broke, or the ring levee on Denver Avenue. [62]

Q. And Denver Avenue failed somewhere along about 9:30 or 10:00 in the evening of May 31st?

A. That is correct.

Mr. Lowry: You may examine.

Cross-Examination

By Mr. Phillips:

Q. Where did the ring levee break, Mr. Dibblee?

A. I wasn't there when the ring levee broke, sir. I was there earlier.

Q. Did you ascertain later where it broke?

A. Pardon?

Q. Did you find out later where it broke?

A. No, I didn't. I just went on to other flood-fight duties.

Q. You never did know, then, where the ring levee broke? A. Not exactly, no.

Q. You didn't know that it broke right there where you saw the water coming up? A. No.

Mr. Lowry: I object to that, your Honor. That is assuming a state of facts that is not in evidence.

The Court: Oh, no. That is proper cross-examination. He says he doesn't know where it was. That covers all the situations, I guess.

Q. (By Mr. Phillips): In so far as Denver Avenue itself is [63] concerned, after the five-by-

(Testimony of Kenneth R. Dibblee.)

five culvert was plugged that held then and that didn't break through there at all, did it?

A. No, the history of the case was the ring levee broke.

Q. Counsel asked you how long Denver Avenue held. As a matter of fact, Denver Avenue never did go out; it was the ring levee. Isn't that true?

A. Yes.

Q. So when you made your answer it was the ring levee you were talking about that gave way and not Denver Avenue?

A. Yes, sir; that is right.

Q. That is true, isn't it?

A. That is correct.

Q. Now, in so far as the five-by-five culvert that was successfully plugged is concerned, that didn't cause the flood that was caused by the breaking of the ring levee, did it?

A. No. It was plugged.

Q. Now, in so far as Union Avenue was concerned, Union Avenue had underpasses cut through it and a culvert through it, didn't it?

A. I didn't understand your question.

Q. You spoke about Union Avenue?

A. Yes.

Q. As a matter of fact, Union Avenue had underpasses and a culvert through it, didn't it?

A. It had one underpass on the northerly end which had been [64] plugged with sandbags. It had two culverts through it, one of which had a gate on it and the other one was an open culvert. Both of

(Testimony of Kenneth R. Dibblee.)

those culverts had been plugged with sandbags prior to the failure of the westerly half of the Pen. 2 District—prior to the break in the ring levee, even.

Q. That was done after the water started in through onto District No. 2? A. No.

Q. When was that plugging done?

A. That would have been done—I think the plugging of those culverts was accomplished along about 2:00 o'clock on the afternoon of the 30th.

Q. That was while the water was coming in on No. 1, wasn't it? A. No.

Q. Isn't that right?

A. I beg your pardon. I am getting mixed up on my dates. I should say that I think it was on the 31st that the water was against the ring levee. Let me put it that way. The water was against the ring levee, and on the 31st, prior to the break of the ring levee, about 2:00 o'clock in the afternoon on the 31st, those two culverts had been plugged and the underpass had been plugged.

Mr. Phillips: I think that is all, your Honor.

Mr. Lowry: That is all, your Honor.

(Witness excused.) [65]

HARRY K. DOYLE

was produced as a witness in behalf of Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Where do you live, Mr. Doyle?

A. 626 Northeast 16th, Portland, Oregon.

Q. Are you employed by the Corps of Engineers? A. I am.

Q. What is your position?

A. Chief of Operations and Maintenance branch, Portland District.

Q. Were you employed by the Corps of Engineers in May and June, 1948? A. I was.

Q. About how many years have you been employed by the Corps of Engineers? A. 41.

Q. In general what sort of work have you done for the Corps?

A. Construction of levees, sea walls, bank abutments, maintenance of flood control dams and reservoirs, and the dredging of rivers and harbors.

Q. About how many years of experience have you had in connection with work on levees and levee problems?

A. Generally throughout the 41 years. [66]

Q. Have you had some experience in the actual conduct of flood fights, Mr. Doyle?

A. Yes, I have.

Q. Have you had some experience on the Mississippi River levees?

(Testimony of Harry K. Doyle.)

A. For a period of 25 years.

Q. Did you participate in flood fights on that river? A. A great many.

Q. Mr. Doyle, do you have any personal knowledge of the construction or maintenance of Denver Avenue? A. No, I do not.

Q. Do you have any personal knowledge about the construction or maintenance of the ring levee?

A. I do not.

Q. Were you present on Denver Avenue on May 31st, 1948? A. I was.

Q. Did you take any part in the flood fight which was conducted out there on that day?

A. I was assigned as an observer of the Columbia River flood and in all the Districts on the Columbia River.

Q. Did representatives of the Oregon State Highway Commission participate in the flood fight along Denver Avenue?

A. They did. I saw Mr. Baldock there.

Q. Who was Mr. Baldock?

A. Mr. Baldock was the Chief State [67] Engineer.

Q. For the Oregon State Highway Commission?

A. That is right.

Q. Were crews from the Oregon State Highway Commission working in connection with that flood fight? A. They were.

Q. Did the Highway Commission have some equipment out there? A. They did.

Q. Did trouble develop, Mr. Doyle, at the site

(Testimony of Harry K. Doyle.)

of the culvert underlying Denver Avenue south of the ring levee?

A. Yes. I observed the Highway force working on this culvert attempting to stop it, stop the flow of water into the east section.

Q. Mr. Doyle, from your observation, if the effort to plug the culvert had not been successful, would Denver Avenue have failed at that location?

A. I think it would have.

Q. Were there other trouble spots along Denver Avenue on May 30th and May 31st?

A. There was one in particular on the north end of Denver Avenue where there was a great deal of sloughing on the Vanport side, Pen. 1, and seepage on the Pen. 2 side where the Highway forces were very actively engaged in repairing sloughing on the Vanport side and sandbagging the Pen. 2 side. And at the time that I was there I was very much concerned that we might have a failure at that location. [68]

Q. Assuming, Mr. Doyle, that the ring levee had not failed, what is your best judgment as to whether Denver Avenue itself would have been able to withstand pressure of the floodwater?

A. I don't think so.

Q. Mr. Doyle, were you on the ring levee on May 30th or May 31st before it failed?

A. I wasn't on the ring levee, but I was right in the vicinity of the ring levee on the 31st in the afternoon.

Q. Did you see some water gushing out from the

(Testimony of Harry K. Doyle.)

toe of the ring levee on Peninsula Drainage District No. 2 side? A. I did.

Q. About how far from the toe of the levee was this water coming out?

A. Well, from my observation, which was just above the ring levee on the Pen. 2 side, it appeared to be about 15 feet from the toe.

Q. Was the water flowing back toward the levee or out toward the District?

A. No, it was flowing over towards the race-track.

Q. Over towards what?

A. Towards the racetrack, east.

Q. It was flowing east? A. East.

Q. As far as you could see, was this water having any effect upon the ring levee? [69]

A. I didn't think so, no.

Q. As far as you could see, was the water carrying any material from the ring levee?

A. No.

Q. Did you see any current in the water adjacent to the western side of the ring levee?

A. No. It was just a pool steadily rising.

Q. Did you see any evidence of any erosion of the western side of the ring levee?

A. None whatever.

Q. About how long have you been familiar with the levees around Peninsula Drainage Districts Nos. 1 and 2? A. Since about 1941.

Q. At any time prior to May 30th, 1948, did you

(Testimony of Harry K. Doyle.)

see any reason to expect any of the primary levees to fail? A. No, I did not.

Mr. Lowry: That is all.

Cross-Examination

By Mr. Phillips:

Q. What are you speaking of when you say "primary levees"?

A. The control levees, the front levees that the river rises against.

Q. Would you tell us which levees those are, referring to District No. 2? [70]

A. I didn't understand you.

Q. Would you tell us which levees those are, particularly referring to Drainage District No. 2?

A. The levees along the Columbia River front and the Columbia Slough in the rear.

Q. What about the eastern levee?

A. On the east it would be a continuation of the Columbia River Slough.

Q. Will you tell us which levees you are referring to in District No. 1?

A. The Columbia River front levee, the Columbia Slough levee, and the railroad fill.

Q. That would be the west and the east levee?

A. North and south and western.

Q. Where did the ring levee dike break, do you know? Where did that levee break?

A. I don't know. I wasn't there.

Q. Denver Avenue did hold, didn't it?

(Testimony of Harry K. Doyle.)

A. Denver Avenue held, yes.

Mr. Phillips: That is all.

Mr. Lowry: That is all.

(Witness excused.)

The Court: We will take a short recess.

(Short recess.) [71]

THOMAS A. MIDDLEBROOKS

was produced as a witness in behalf of Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Where do you live, Mr. Middlebrooks?

A. Alexandria, Virginia.

Q. Are you employed by the Corps of Engineers?
A. Yes, sir.

Q. What is your position?

A. Chief of the Soils Branch in the Office of the Chief of Engineers.

Q. Where do you have your office?

A. Gravelly Point, Virginia.

Q. That is near Washington?

A. Washington, D. C.

Q. What, in general, are your duties?

A. I am responsible for the design, construction and proper operation of levees, plus flood control projects, the foundations relating thereto—anything

(Testimony of Thomas A. Middlebrooks.)

built or constructed of earth or on earth, earth dams, levees, and structures relating thereto.

Q. Does your responsibility extend to all or a large share of the work done by the Corps of Engineers in connection with levee structures?

A. All work by the Corps of Engineers, civil works. [72]

Q. Have you had some professional education as an engineer?

A. Yes, sir. I am a graduate of the Georgia Institute of Technology, with a degree in civil engineering, and had post-graduate work at the Massachusetts Institute of Technology in Soils Mechanics.

Q. Would you summarize briefly your employment since you left school?

A. On graduating from Georgia Tech in 1928 I spent a year on the Lower Mississippi on levee construction; returned to the M.I.T. for post-graduate work, and after that returned to the Mississippi levee construction work through 1933. From 1933 to 1937 I was on the construction of the Fort Peck Dam in Montana. From 1937 to date, Chief of the Soils Branch.

Q. Would you tell us briefly what experience you have had in connection with the design of earth dams?

A. Well, starting in 1937 and since then I have worked on the design and construction of all the earth dams that the Corps of Engineers has built.

Q. About how many dams have you had some connection with?

(Testimony of Thomas A. Middlebrooks.)

A. Oh, I would say those in process of design as well as those being built and already constructed, close to 100.

Q. Have you had some experience in connection with the construction of earth fills other than levees and dams?

A. Yes; railroads, highways and relocations connected with our projects. [73]

Q. Have you had some experience in connection with the design of levees?

A. Yes. My entire professional experience, except for the years at Fort Peck, has related directly to levee design and construction.

Q. Approximately how many miles of levee have you approved or reviewed or designed?

A. Oh, I would say somewhere close to 1,500 miles.

Q. With what levee systems in the United States are you generally familiar, Mr. Middlebrooks?

A. First, with the Lower Mississippi, where I started my work with the Corps, the Arkansas, the Red, the Kansas and Missouri Rivers, the Columbia, Sacramento, and San Joaquin Valley.

Q. Have you had some experience in the actual conduct of flood fights? A. Yes, sir.

Q. Has your work included studies of the properties of soils? A. Yes.

Q. Have you done some laboratory work in that connection? A. Yes, sir.

Q. Do you belong to some technical societies?

(Testimony of Thomas A. Middlebrooks.)

A. Yes; the American Society of Civil Engineers, and the Society of Military Engineers.

Q. Have you held positions with any of those societies? [74] A. Yes.

Q. Have you done some writing on engineering subjects?

A. Yes; several papers on various subjects relating to the design of earth structures to hold back water.

Q. Mr. Middlebrooks, is it customary practice in connection with the construction of levee systems to build secondary levees to provide protection in the event the primary levees fail?

A. No, it is not.

Q. To your knowledge, have any such secondary levees been built by the Corps of Engineers?

A. No.

Q. If funds are available for levee construction work, are those funds, in your opinion, spent to the best advantage on primary or secondary levees?

A. They are spent to the best advantage by strengthening the primary levees.

Q. Have you ever recommended the construction of secondary levees to provide protection in the event of failure of the primary levees?

A. No.

Q. Do you know of any standards or specifications for the design or construction of such secondary levees? A. I do not.

Q. Do adjacent drainage districts, in your experience, always [75] have levees between them?

(Testimony of Thomas A. Middlebrooks.)

A. Very seldom do they have any levees. In a recent case that I had, St. Louis, the Upper Mississippi Valley, five districts were included in one levee system.

Q. Did these districts have any flood protection structures between them at all? A. No.

Q. Are you familiar with Paragraphs 1 to 15, inclusive, of the Agreed Statement of Facts on file in this case? A. Yes.

Q. Assuming a system of primary levees and embankments as there described, was there in your opinion any reason to believe that any of the primary levees or embankments would fail structurally? A. No.

Q. What types of failure are considered structural failures?

A. Under-seepage, flowing out from underneath, uncontrolled seepage, sloughing of the levee, land side or river side—all failures except overtopping.

Q. That is, all failures other than overtopping are considered structural failures? A. Yes.

Q. Now, assuming a system of primary levees and embankments as described in the Agreed Statement of Facts, would you have recommended the construction of secondary levees to provide protection in the event of structural failure of the [76] primary levees or embankments? A. No.

Q. Assuming such a system of primary levees and embankments, would you have recommended the construction of a secondary levee at the site of Denver Avenue to provide protection in the event

(Testimony of Thomas A. Middlebrooks.)

of structural failure of any of the primary levees or embankments? A. No.

Q. Assuming such a system of primary levees and embankments, and assuming an underpass through Denver Avenue, would you have recommended the construction of a ring levee around the underpass to provide protection in the event of structural failure of any of the primary levees or embankments? A. No.

Q. Assuming levee elevations described in the Agreed Statement of Facts, could the levees of Peninsula Drainage District No. 1 have been overtopped by floodwaters when the levees of Peninsula Drainage District No. 2 were not so overtopped?

A. No.

Q. Assuming the levee elevations described in the Agreed Statement of Facts, could the levees of Peninsula Drainage District No. 2 have been overtopped by floodwaters when the levees of Peninsula Drainage District No. 1 were not so overtopped?

A. Yes.

Q. Assuming the levee elevations described in the Agreed Statement [77] of Facts, and assuming that a ring levee was to be constructed around Denver Avenue underpass, what was the risk, in your opinion, which the ring levee should have been designed to protect against?

A. Against overtopping of District No. 2, because the levees were lower.

Q. Are you familiar with Paragraph No. 12 of the Agreed Statement of Facts on file in this action

(Testimony of Thomas A. Middlebrooks.)

describing the ring levee constructed around Denver Avenue underpass? A. Yes.

Q. In your opinion was the ring levee designed to protect against a particular risk?

A. Yes; it was designed to protect against water from District No. 2.

Q. Is that on the assumption that those levees would be first overtopped?

A. Would be first overtopped.

Q. What are the facts about the ring levee which in your opinion show that it was designed to protect against the risk that Peninsula District No. 2 levees would be overtopped?

A. The fact that it had a clay blanket on the side of the levee, on the District No. 2 side.

Q. Under all the circumstances described in the Agreed Statement of Facts was it, in your opinion, an exercise of due care and good engineering practice to design a ring levee to protect [78] against the risk that Peninsula Drainage District No. 2 levees would be overtopped? A. Yes.

Q. Under all the circumstances described in the Agreed Statement of Facts, and assuming that a ring levee was to be constructed around the Denver Avenue underpass, would you personally have designed that levee to protect against the risk that the Peninsula Drainage District No. 2 levees would be overtopped? A. Yes.

Q. Under all the circumstances described in the Agreed Statement of Facts, and assuming a ring levee was to be constructed around Denver Avenue

(Testimony of Thomas A. Middlebrooks.)

underpass, would you personally have designed that levee to protect against the risk of structural failure of any of the primary levees? A. No.

Q. Are you familiar with Paragraph 13 of the Agreed Statement of Facts on file in this case describing the repair work which was done on the ring levee? A. Yes.

Q. Was that repair work, in your opinion, adequate to bring the levee back to its original condition? A. Yes.

Q. Assuming a system of levees and embankments as described in the Agreed Statement of Facts, and assuming the inundation of Peninsula Drainage District No. 1 by floodwaters reaching a [79] height of 32.4 feet M.S.L., would you have expected the Denver Avenue fill itself to withstand the pressure of the floodwaters indefinitely?

A. No.

Q. Assuming a system of levees and embankments as described in the Agreed Statement of Facts, and assuming floodwater moving to the ring levee from the west, would you have expected any erosion of the ring levee?

A. No, I would not, since it was back in a pocket.

Q. Now, assuming a system of levees and embankments as described in the Agreed Statement of Facts, and a ring levee as there described, would you have considered the ring levee adequate to provide protection against water coming from the east?

(Testimony of Thomas A. Middlebrooks.)

A. I would consider it comparable to Denver Avenue in protection.

Q. That is, on water coming from Peninsula Drainage District No. 2?

A. Yes, from that side, where you have the clay blanket, I would consider it somewhat superior to Denver Avenue in protection.

Q. Now, assuming a system of levees and embankments as described in the Agreed Statement of Facts, and a ring levee as there described, would you have considered the ring levee adequate to provide protection against water coming from the west; that is, [80] from Peninsula Drainage District No. 1?

A. I would consider it equal to Denver in adequacy.

Mr. Lowry: You may examine.

Cross-Examination

By Mr. Phillips:

Q. When the ring levee went out, was that what you would call a structural failure?

A. Yes, sir.

Q. That was a structural failure of the ring levee? A. Yes.

Q. Now, you say the ring levee was built there to protect District No. 1 from water coming from District No. 2. Is that correct?

A. That appears to be the fact from the way the levee was designed.

Q. You have studied it? A. Yes.

(Testimony of Thomas A. Middlebrooks.)

Q. In connection with your ring levee, what else protected District No. 1 from water coming from District No. 2 except your little ring levee there?

A. Denver Avenue.

Q. You would say Denver Avenue is a protection from water?

A. Some protection, some temporary protection.

Q. As much as your ring levee? [81]

A. Yes.

Q. Now, as a matter of fact, Denver Avenue and your ring levee was the only protection that No. 1 had from water coming from No. 2; isn't that correct? A. Yes, I think that is correct.

Q. And, vice versa, the only protection No. 2 had from water coming from No. 1 was the same thing, wasn't it?

A. After it had gotten into No. 1, yes.

Q. Pardon?

A. After it had gotten into No. 1, yes.

Mr. Phillips: That is not the question I asked you. Will you read it?

(Last question read.)

A. Yes.

Q. I believe you said that the ring levee was constructed for the purpose of stopping the water coming from an overtopping of District No. 2; is that correct?

A. That appears to be the case from the facts presented.

Q. As a matter of fact, there was no overtopping on either No. 1 or No. 2, was there?

(Testimony of Thomas A. Middlebrooks.)

A. No, but the potential was there in No. 2.

Q. But, as a matter of fact, neither one of them was overtopped by that flood; isn't that correct?

A. No, not as far as I know.

Q. Insofar as the other levees which were concerned, they [82] all held with the exception of your ring levee down to the west there, on the west levee of No. 1; isn't that right?

A. I think the Statement of Facts bears that out.

Q. Pardon?

A. I think the Statement of Facts bears that out.

Q. I believe you said that in your opinion the ring levee as constructed would have given No. 1 as much protection from water coming from No. 2 as the Denver Avenue fill? A. Yes, somewhat.

Q. Is the converse true on that? Would the ring levee give as much protection from water coming from No. 1 as Denver Avenue?

A. Comparable to Denver Avenue, yes.

Q. Pardon?

A. Comparable to Denver Avenue, yes.

Q. In your opinion, your ring levee was as strong as Denver Avenue for water coming from the west?

A. Right.

Q. And I believe you said that there should be no erosion on your ring levee?

A. From the west.

Q. From the west?

A. Because there is a pocket.

Q. Now, you are acquainted with the fact that the water was coming through a narrow underpass,

(Testimony of Thomas A. Middlebrooks.)

are you not? [83] A. Yes.

Q. Would that create any current?

A. Very little.

Q. Pardon?

A. Very little. It had only a small pocket to fill up.

Q. Would that create any current?

A. Very little coming in through there.

Q. In your opinion will a ring levee erode faster than a straight levee?

A. It depends on which side of the ring levee you are talking about.

Q. I am talking in this particular case about the west side. A. On the west side, no.

Q. It would not erode there?

A. Not as fast, because it is in a pocket. It is protected. It is like a ship in a harbor.

Q. However, if there was a current there, then what would occur?

A. I can see no possibility of a current existing there.

Q. Would you answer my question? Let's just assume that there was a current there.

A. Well, if you assume there was a current, the curvature of the levee—the current would be inside the curvature, and I should say that it would probably get about the same or less attack than a straight levee. [84]

Q. Then, in your opinion, water rising gradually on a straight levee erodes just as much as water against a curved levee that is under pressure?

(Testimony of Thomas A. Middlebrooks.)

A. On a curve that is an inside curve rather than an outside curve, which we are talking about here.

Q. You would get just as much erosion, in your opinion? A. On an inside curve, yes, or less.

Q. As a matter of fact, Denver Avenue held, did it not?

A. By a superhuman effort to hold the weak spot.

Mr. Phillips: Will you read that question to him again?

(Last question read.)

A. Yes, it held after a fight.

Q. After what? A. After a flood fight.

Q. Is it customary in levees like this ring levee that you would recommend putting a 16-inch pipe through the bottom of that levee and also putting 10-inch water pipes four or five feet into the levee and leaving them there?

A. Adequately designed pipes are put through levees on numerous occasions.

Q. Do you ever do anything to protect the ends of the pipe or your levee when you do that?

A. The pipe usually has a flap gate on the side from which we expect the water to come.

Q. A what? [85]

A. A flap gate, or a positive closure, one or the other.

Q. Do you ever protect the earth of the levee around the pipe where it comes through the levee?

A. Oh, sometimes, but not on the side which the

(Testimony of Thomas A. Middlebrooks.)

water is entering, usually, unless it is a very large and a very high flood.

Q. Why do you protect the ends of the pipes or your culverts? What happens if you don't?

A. Oh, on your larger culverts, why, you have enough flow to cause erosion.

Q. It would cause erosion?

A. On the larger culverts, yes.

Q. I believe you said you were acquainted with the diking system on the Columbia River. Am I correct in that? A. Yes, sir.

Q. Now, as a matter of fact, no dike in that diking system the same size as Denver Avenue went out during that flood, did it?

The Witness: Will you read that question?

(Last question read.)

A. As far as I know, that is true.

Mr. Phillips: I think that is all, your Honor.

Redirect Examination

By Mr. Lowry:

Q. Do you happen to know now, Mr. Middlebrooks, how the railroad [86] fill on the western embankment at Vanport compares in size to Denver Avenue?

A. Well, generally speaking, I can't quote you the figures exactly.

Q. Mr. Phillips asked you whether or not Peninsula Drainage District No. 1 had any protection from water coming from the east other than the

(Testimony of Thomas A. Middlebrooks.)

Denver Avenue fill and the ring levee. It is true, is it not, that it had the protection of the primary levee of Peninsula Drainage District No. 2?

A. Yes.

Q. And the same thing is true, that Peninsula Drainage District No. 2 had the protection of the primary levees of Peninsula Drainage District No. 1? A. Yes. I tried to point that out.

Mr. Lowry: That is all.

Mr. Phillips: Nothing further.

(Witness excused.) [87]

WILLARD J. TURNBULL

was produced as a witness in behalf of Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Where do you live, Mr. Turnbull?

A. Vicksburg, Mississippi.

Q. Are you employed by the Corps of Engineers? A. Yes, sir.

Q. What is your position?

A. Chief of the Soils Engineering Division.

Q. You have your office in Vicksburg?

A. Yes, sir; at the Waterways Experiment Station. That is one of the Corps offices there.

Q. What, in general, are your duties?

A. In general charge of investigations in connection with earthen embankments and special prob-

(Testimony of Willard J. Turnbull.)

lems on levee design and research and development problems in military work.

Q. Have you had some professional education as an engineer? A. Yes, sir.

Q. What was that?

A. I graduated in civil engineering in 1925 from the University of Nebraska, and got a civil engineering degree in 1942 from the University of Nebraska.

Q. Would you please summarize your employment since you left [88] school?

A. After graduation in 1925 I served as an officer with the Coast Geodetic Survey in the Philippines for a couple of years. Subsequent to that time, until about '35, I served in various capacities for the Nebraska Highway Department, most of the time as Assistant State Testing Engineer in testing and field inspection of various types of road construction materials. Subsequent to that time I served as Soils Engineer and Chief of the Laboratory for the Central Nebraska Public Power and Irrigation District in Nebraska. In that capacity I had charge of field investigations, geological studies and laboratory tests and design, construction and inspection of earth dams and foundations for various types of hydraulic structures, and a good many miles of core bank levees along sidehill-cut canals. Subsequent to that time and to the present date I have served as Soils Engineer, Chief of the Soils Division, at the Waterways Experiment Station.

(Testimony of Willard J. Turnbull.)

Q. Your experience, then, has included experience with earth dams as well as with levees?

A. Yes, sir.

Q. Have you had some special experience in connection with the design of levees, Mr. Turnbull?

A. Yes, sir.

Q. What was that?

A. The experience usually has had connection with special [89] problems involving seepage or settlement where there were undoubtedly soft foundations.

Q. What levee systems in the United States are you familiar with?

A. The Lower Mississippi Valley system.

Q. About how many years of experience have you had in connection with levee work of one kind or another?

A. 12 to 15, I would say.

Q. Has your work included studies of the properties of soils?

A. Yes, sir.

Q. Have you done some laboratory work in that connection?

A. Yes, sir.

Q. Do you belong to some technical societies?

A. Yes, sir.

Q. Which ones?

A. The American Society of Civil Engineers and the local section group in the community in which I reside, the American Society of Civil Engineers, Highway Research Board, and numerous others, and I have a professional engineer's license from the State of Nebraska.

Q. Is it customary practice in connection with

(Testimony of Willard J. Turnbull.)

the construction of levee systems to build secondary levees to provide protection in the event the primary levees fail? A. No.

Q. To your knowledge, have any such secondary levees been [90] built by the Corps of Engineers?

A. No.

Q. If funds are available for levee construction work, are those funds, in your opinion, spent to the best advantage on primary or secondary levees?

A. On primary levees.

Q. Have you ever recommended the construction of secondary levees to provide protection in the event of failure of the primary levees?

A. No.

Q. Do you know of any standards or specifications for the design or construction of such secondary levees? A. No.

Q. Are you familiar with Paragraphs 1 to 15, inclusive, of the Agreed Statement of Facts on file in this case? A. Yes.

Q. Assuming a system of primary levees and embankments, as there described, was there, in your opinion, any reason to expect that any of the primary levees or embankments would fail structurally? A. No.

Q. What types of failure are considered structural failures, Mr. Turnbull?

A. Well, every type of failure with the exception of overtopping.

Q. Assuming a system of primary levees and embankments, as [91] described in the Agreed

(Testimony of Willard J. Turnbull.)

Statement of Facts, would you have recommended the construction of secondary levees to provide protection in the event of structural failure of the primary levees or embankments? A. No.

Q. Assuming such a system of primary levees and embankments, would you have recommended the construction of a secondary levee at the site of Denver Avenue to provide protection in the event of structural failure of any of the primary levees or embankments? A. No.

Q. Assuming such a system of primary levees and embankments, and assuming an underpass through Denver Avenue, would you have recommended the construction of a ring levee around the underpass to provide protection in the event of structural failure of any of the primary levees or embankments? A. No.

Q. Assuming the levee elevations described in the Agreed Statement of Facts, could the levees of Peninsula Drainage District No. 1 have been overtopped by floodwaters when the levees of Peninsula Drainage District No. 2 were not so overtopped?

A. No.

Q. Assuming the levee elevations described in the Agreed Statement of Facts, could the levees of Peninsula Drainage [92] District No. 2 have been overtopped by floodwaters when the levees of Peninsula Drainage District No. 1 were not so overtopped? A. Yes.

Q. Assuming the levee elevations described in the Agreed Statement of Facts, and assuming that

(Testimony of Willard J. Turnbull.)

a ring levee was to be constructed around the Denver Avenue underpass, what was the risk, in your opinion, which the ring levee should have been designed to protect against?

A. Overtopping of the No. 2 primary levees.

Q. Are you familiar with Paragraph 12 of the Agreed Statement of Facts on file in this action describing the ring levee constructed around Denver Avenue underpass? A. Yes.

Q. In your opinion, was the ring levee designed to protect against a particular risk? A. Yes.

Q. What was that risk?

A. Floodwaters in 2 going into 1.

Q. On account of the overtopping of 2?

A. That is right.

Q. What are the facts about the ring levee which in your opinion show that it was designed to protect against the risk that the Peninsula Drainage District No. 2 levees would be overtopped? [93]

A. There are two things. One is the clay blanket on the east side. The other is the floodgate on the east side of the pipe.

Q. In the ring levee? A. Through the fill.

Q. Under all the circumstances described in the Agreed Statement of Facts was it, in your opinion, an exercise of due care and good engineering practice to design the ring levee to protect against the risk that Peninsula Drainage District No. 2 levees would be overtopped? A. Yes.

The Court: It was a secondary levee, though; is that right?

(Testimony of Willard J. Turnbull.)

A. Pardon?

The Court: I thought you said you would not construct a secondary levee any place?

A. I think, your Honor—my opinion would be that on the basis of what must have been in the minds of the people when they constructed the levee, it was that they needed some protection to get the people out of Vanport should the levees in No. 2 overtop. I mean it was just sound thinking. That would be my opinion.

The Court: It would be sound thinking in a lot of these other districts, too, to construct secondary levees in order to stop the flow for a while. Isn't that correct?

A. My opinion would be that that was largely in connection with [94] the large number of people living in Vanport.

The Court: You said, though, that you didn't know anything about any secondary levees under any circumstances and that it is never done, and that you would not do it. Now it seems to me that is entirely inconsistent with what you are saying now.

A. That is from the standpoint of structural failures.

The Court: What?

A. From the standpoint of structural failures.

The Court: But then you said you didn't know any place where a secondary levee was constructed at all; that you didn't know any design for it.

A. That is right.

(Testimony of Willard J. Turnbull.)

The Court: And that you personally would not construct it.

A. To guard against the structural failure of levees.

The Court: If there are no designs, then you don't know of any designs.

A. Well, I think, your Honor, the question—the way I was thinking of it was the design of a levee specifically designed, a secondary levee, to protect against structural failures of primary levees.

The Court: All right. Do you know of any plans for secondary levees?

A. I know of no plans for secondary levees in that sense. Now we do know—— [95]

The Court: Do you know of any in any sense?

A. We know of inferior types of levee construction.

The Court: What does that mean?

A. In the cases of which I am thinking that would be levees which are constructed to protect against low heads where the material is not compacted as well as it is for higher heads, but they would still serve as primary levees.

The Court: As far as I am concerned, this testimony is entirely inconsistent.

Mr. Lowry: Your Honor, perhaps I might explain a little bit what our thought about this matter is. Of course, Mr. Turnbull can talk for himself as a witness, but perhaps I can explain the Government's view on that.

The Court: No; you go ahead and ask him some

(Testimony of Willard J. Turnbull.)

questions. If you want to develop that any further, all right.

Q. (By Mr. Lowry): Mr. Turnbull, are you familiar with Paragraph 13 of the Agreed Statement of Facts on file in this case describing the repair work done on the ring levee in 1944?

A. Yes, sir.

Q. Was the repair work, in your opinion, adequate to bring the levee back to its original condition? A. Yes.

Q. Assuming a system of levees and embankments as described in the Agreed Statement of Facts, and assuming the inundation of Peninsula Drainage District No. 1 by floodwaters [96] reaching a height of 32.4 feet M.S.L., would you have expected the Denver Avenue fill itself to withstand the pressure of floodwaters indefinitely?

A. No.

Q. What feature or features of the Denver Avenue fill would you have expected to be troublesome?

A. The fact that the Agreed Statement of Facts recognizes that a culvert existed and was plugged, I would have been extremely suspicious of it, and the possibility of stopping the flow of water like that once it starts is very difficult.

Q. Assuming a system of levees and embankments as described in the Agreed Statement of Facts, and assuming floodwater moving to the ring levee from the west, would you have expected erosion of the ring levee? A. No.

Q. Now, assuming a system of levees and em-

(Testimony of Willard J. Turnbull.)

bankments as described in the Agreed Statement of Facts, and a ring levee as there described, would you have considered the ring levee adequate to provide protection against water coming from the east; that is, from the Peninsula Drainage District No. 2 side? A. Yes.

Q. Now, assuming a system of levees and embankments as described in the Agreed Statement of Facts, and a ring levee as there described, would you have considered the ring levee adequate to provide protection against water coming from [97] the west; that is, from the Peninsula Drainage District No. 1 side?

A. I would have considered it approximately as good as the highway fill, in view of the fact that the culvert existed and was plugged, knowing that that would be a weak spot.

Mr. Lowry: You may examine.

Cross-Examination

By Mr. Phillips:

Q. Would you recommend taking out secondary levees? A. Pardon?

Q. Would you recommend taking out secondary levees?

A. I would not recommend building them in the first place.

Mr. Phillips: Would you read the question, please?

(Last question read.)

(Testimony of Willard J. Turnbull.)

A. I think that the answer—the only way I could answer that question is that if a levee or fill is in place economically it would not be sound to take it out. But, basically, on the concept of primary levees, I would never build it in the first place.

Q. My question was, would you recommend taking out a secondary levee that was there?

A. No.

Q. You would not, as I understand your answer now. Is that correct? [98]

A. That is correct.

Mr. Phillips: I think that is all, your Honor.

Mr. Lowry: That is all.

(Witness excused.)

(Thereupon a recess was taken until 2:00 o'clock p.m. of the same day, August 5, 1953, at which time Court reconvened and proceedings herein were resumed as follows.) [99]

R. H. BALDOCK

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Where do you live, Mr. Baldock?

A. Salem, Oregon.

Q. Are you employed by the Oregon State Highway Commission? A. I am.

Q. What position do you hold?

A. State Highway Engineer.

(Testimony of R. H. Baldock.)

Q. How long have you held that position?

A. Since 1932.

Q. In general what are your duties as State Highway Engineer?

A. I have charge of engineering matters and am the chief administrative official of the State Highway Department.

Q. Are you familiar with the Interstate Bridge between Portland, Oregon, and Vancouver, Washington?

A. I am.

Q. Are you familiar with one of the approaches to that bridge known as Denver Avenue?

A. I am.

Q. Is Denver Avenue an Oregon State Highway?

A. It is.

Q. Do you happen to know about when Denver Avenue became an [100] Oregon State Highway?

A. It was placed on the map as a State Highway in 1937.

Q. Has Denver Avenue ever since been an Oregon State Highway?

A. It has.

Q. Are you familiar with one of the approaches to the Interstate Bridge known as Union Avenue?

A. I am.

Q. Is Union Avenue an Oregon State Highway?

A. It is.

Q. About when, if you know, did it become an Oregon State Highway?

A. As I recall, it was 1931.

Q. Has Union Avenue ever since been an Oregon State Highway?

A. It has.

(Testimony of R. H. Baldock.)

Q. Do you recall that some time in 1942 a proposal was made to build an underpass beneath Denver Avenue? A. I do.

Q. Did that proposal come to your attention, Mr. Baldock? A. It did.

Q. What was the purpose of the proposed underpass?

A. To give access to the town of Vanport.

Q. Was this a proper purpose from a highway and traffic point of view? A. It was.

Q. Was there some safety factor involved in providing for the [101] underpass?

A. It would have been highly dangerous to try to make the access without separating the opposing streams at grade.

Q. Did that require the construction of the underpass? A. It did.

Q. Did you approve the proposal for the construction of the underpass? A. I did.

Q. Did your office prepare the plans for the construction of the Denver Avenue underpass?

A. Yes.

Q. Did an engineer from your office supervise the construction of the underpass? A. Yes.

Q. Do you remember who that was, Mr. Baldock? A. I think it was Mr. Lowell Johnson.

Q. Now, did the plans for the Denver Avenue underpass, as prepared by your office, call for the construction of a ring levee around the underpass?

A. No.

Q. Did those plans call for the construction of

(Testimony of R. H. Baldock.)

any flood control structure in connection with the underpass? A. No.

Q. At about the time the Denver Avenue underpass was constructed was a suggestion made to the Highway Commission by [102] Peninsula Drainage District No. 1 that Denver Avenue should be regarded as a levee? A. Yes.

Q. What was the position of the Highway Commission in that connection?

A. The matter was discussed with the Commission's counsel and with the Commission itself, and on the advice of counsel the Commission instructed Mr. Devers, who was counsel at that time, to answer the communication and to advise Peninsula District No. 1, that at no time had the Highway Commission regarded Denver Avenue as a dike and would not do so now—or then.

Q. Mr. Baldock, did you or the Oregon State Highway Commission have anything to do with the construction or maintenance of the ring levee around the underpass?

A. Well, I can't recall. I know we had nothing to do with the design, and I can't recall whether we looked after its construction or not. All of that work was done with Government funds; none of the State Highway Funds. And we merely looked after the construction of the underpass so as to safeguard the interests of the State Highway Department.

Q. I see. Were you present on Denver Avenue on the evening of May 31st, 1948?

A. I was.

(Testimony of R. H. Baldock.)

Q. Did you participate in the flood fight which was conducted [103] on Denver Avenue on that date? A. I did.

Q. Did the crews from the Oregon State Highway Department participate in that flood fight?

A. They did.

Q. Was equipment belonging to the Oregon State Highway Department used in the flood fight?

A. Yes.

Q. Did trouble develop at the site of a culvert underlying Denver Avenue somewhat south of the underpass? A. It did.

Q. Can you tell us generally what happened there?

A. Well, for quite some time we thought that we would lose Denver Avenue; in other words, that the flood would wash through it at that point. And only by the use of some mesh material that was used in the last war for landing fields were we able to—with that and sandbags—were we able to stop this erosion. I told them that they should get their barricades and everything ready because I was afraid that the flood would break through at that point.

Q. Was there trouble on any other location along Denver Avenue?

A. Yes. There was also quite serious trouble at the north end of Denver Avenue, not far from the junction with Union.

Q. What happened there? [104]

A. A similar erosion and boiling and the re-

(Testimony of R. H. Baldock.)

moval of material by the floodwaters. But we likewise were able to stop it.

Q. Now, assuming the ring levee had not failed, what is your best judgment as to whether Denver Avenue would have been able to withstand the pressure of the floodwaters?

A. It is my opinion it would not.

Mr. Lowly: You may cross-examine.

Cross-Examination

By Mr. Phillips:

Q. It did withstand it, though, didn't it, Mr. Baldock? A. Sir?

Q. It did withstand it, though, didn't it?

A. Withstood it until the ring levee gave way.

Q. Yes.

A. But it was being continually soaked up and getting weaker all the time, in my opinion.

Q. Denver Avenue didn't give way; it was the ring levee, wasn't it?

A. That is right. The ring levee finally gave way.

Q. And this place at the culvert you say you were afraid of, that was successfully plugged? It didn't give way there, did it?

A. It was at the time, yes.

Q. Pardon? [105]

A. I say, we did plug it at the time.

Q. And it held, didn't it?

A. Yes, it did.

Q. The only place that the water went through

(Testimony of R. H. Baldock.)

Denver Avenue, was when the ring levee broke and where the ring levee broke; isn't that so?

A. That is right.

Q. Now, I believe you say that you consider Denver Avenue as a highway. That is correct, isn't it?

A. That is right.

Q. And so advised District No. 1?

A. Yes.

Q. You had another highway to the west of District No. 1, named Portland Road, down there on the railroad fill, didn't you?

A. I don't remember the name of it. It is a section that goes to the west of the railroad track.

Q. There is a highway there?

A. That is right.

Q. I believe it is admitted that it is Portland Road down there on the railroad fill?

A. A highway at low level, yes.

Q. Beg pardon?

A. It is a highway at a very low level.

Q. But it is there, isn't it?

A. Yes. [106]

Q. Now, do you consider that as anything but a highway?

A. That is all it is as far as I am concerned.

Q. What would you consider the railroad fill? Just a railroad fill and a railroad?

A. Well, as far as I was concerned, it was a railroad.

Q. Nothing else but a railroad and a railroad fill?

(Testimony of R. H. Baldock.)

A. I understood that the diking districts considered it as a dike, but we were not interested in dikes and had nothing to do with them.

Q. You also knew that District No. 2 considered Denver Avenue as a dike, didn't you?

A. Yes. I think No. 1 were the ones that considered it a dike. We wrote to both of them.

Q. What about No. 2 to the east of it there?

A. Well, at the time that we planned to pierce Denver Avenue with the underpass, I wrote a letter to both the secretaries of District 1 and District 2, and told them that we were planning to do it, and that we had heard rumors that they considered it a dike, which we would not acknowledge and accepted no responsibility therefor. I can't remember the exact language, but words to that effect.

Q. Whatever name you call it, it was a pile of dirt there with a concrete top on it that stopped the floodwaters; isn't that correct?

A. Stopped the floodwaters temporarily. [107]

Q. Until the ring levee broke that you had nothing to do with? A. That is right.

Q. So Denver Avenue did not break and it did stop the water so far as Denver Avenue was concerned, didn't it?

A. It did up to that time. I stated that I don't think it would have very long.

Q. You said that before? A. Yes.

Q. But it did hold, didn't it?

A. That is right; it did.

(Testimony of R. H. Baldock.)

Q. Now, down at the north end you said you had some trouble down there. That was successfully blocked, too, wasn't it? A. We did, yes.

Q. Do you know where the ring levee broke?

A. Well, it broke, as I recall, about the north-east quadrant, more to the east than the north.

Q. Now, Union Avenue had a couple of culverts through it and also it had an underpass through it, didn't it?

A. I can't recall the underpass on Union. It had culverts that were put through by the Drainage District.

Q. The east side of Union Avenue, Drainage District No. 2, east of Union Avenue was drained to the west down to the pumping station by the side of Denver Avenue; is that correct?

A. I can't tell you, sir. [108]

Q. You don't know that?

A. I don't recall it, no.

Q. Do you know where the pumping station was out there? A. Yes, I remember it.

Q. Do you know that there was no pumping station east of Union Avenue?

A. I don't recall any.

Q. That is, in District No. 2? A. Yes.

Q. Do you know which way the water drained, whether it was from east to west or west to east, in District No. 2?

A. No, we were not interested in the drainage, and therefore I wasn't advised of it.

Q. You said that you were afraid that Denver

(Testimony of R. H. Baldock.)

was going out, and that you were down there working on the flood control; that you wanted to save Denver Avenue. It wasn't just Denver Avenue you wanted to save, but it was the people's property east of Denver Avenue, was it not?

A. In a matter of great emergency the State Highway Department always does what it can to help.

Q. Were you trying to save the lives and the property of people east of Denver Avenue from the floodwaters?

A. We were trying to stop the floodwaters from breaking through.

Q. Why?

A. Because, in the first place, it would be doing a great [109] damage to property; in the second place, it would stop traffic on Denver Avenue. It was quite apparent that Union Avenue would fail quite quickly, and it subsequently did; so we were trying to keep the traffic ways free, and likewise do what we could to help out other people. I might say in a matter of emergency that way we didn't ask what our authority was or what our responsibilities were, or anything. We were just trying to help everybody else that was working there.

Q. And along the same line there were any number of volunteers, weren't there? It wasn't only Highway equipment and Highway people; there was any number of volunteers trying to do the same thing?

A. That is right.

Q. Isn't that true?

A. That is right.

(Testimony of R. H. Baldock.)

Q. You were all trying to do the same thing, to hold the water there at Denver Avenue, weren't you? A. That is right.

Q. Because Denver Avenue was the best place to hold the water that you had out there; isn't that right?

A. Well, after the water had broken through the railroad fill Denver Avenue was the only way to keep it from going towards the east.

Q. What did you consider that little ring levee around there that was attached to your highway? Was that a levee of any [110] kind, or was that part of your highway, or what was that?

A. It wasn't part of the highway. It was added after the plans were prepared for the Denver Avenue underpass. As I remember, it was added by the Housing Administration. I know that we had nothing to do with it, and never assumed any responsibility for it.

Q. It hooked onto your highway, didn't it?

A. It did. We gave them a permit to do that.

Q. On both ends?

A. Yes. We gave them a permit to hook on.

Q. Yes, to prevent water from going through there. That was what it was for, wasn't it?

A. It was for whatever their purpose was. We had no purpose in it whatsoever.

Q. Do you know what purpose it was for?

A. Well, it was evident that it was a ring dike, yes.

Q. What?

(Testimony of R. H. Baldock.)

A. It was evident that it was a ring dike. But we told them and we told everybody else in writing that we didn't consider Denver Avenue a dike, had never considered it a dike, and would pierce it in order to facilitate traffic flow between Denver Avenue and the town of Vanport.

Q. Did you know that the fill in Denver Avenue was partially on private property?

A. Please? [111]

Q. Did you know that the fill of Denver Avenue was partially on private property?

A. I think that that was there by reason of slope easements. It is quite customary to get certain right-of-way by slope easements, and I am quite sure that there are slope easements on Denver Avenue, although I have never checked it.

Q. You haven't looked at the deeds from Multnomah County? A. No, I haven't.

Q. Nor your contract with Multnomah County; you haven't looked at that?

A. Yes, I have, but it has been quite some time ago.

Mr. Phillips: I think that is all.

The Court: About this right-of-way on Denver Avenue. Is that in the stipulation?

Mr. Lowry: Yes, your Honor, and the deeds from Multnomah County.

The Court: That is all right. I thought that was the case, but I wanted to be sure.

Mr. Lowry: Yes, it is in.

(Witness excused.)

Mr. Lowry: That closes the Government's case, your Honor. [112]

F. R. SCHANCK

was recalled as a witness in behalf of the Plaintiffs, in rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. Mr. Schanck, are you acquainted with that railroad fill to the west of District No. 1?

A. I have observed it, and I have talked to the men who were there when it was built.

Q. Have you made a study of the construction of that railroad fill? Do you know how it was constructed?

A. I of course have observed the size and shape of it, but the information as to how it was constructed came to me from the engineers who were in charge of it.

Q. And this pre-trial order? A. Yes.

Q. In your opinion, Mr. Schanck, I will ask you whether or not the Denver Avenue fill was more effective in stopping water coming from the west to the east than the railroad fill?

A. Yes, sir; very much more effective.

Mr. Phillips: I think that is all.

Mr. Lowry: That is all.

(Witness excused.)

Mr. Phillips: That is our case, your [113] Honor.

Mr. Lowry: We are through.

The Court: What do you want to do about submission, now?

Mr. Lowry: Your Honor, I think under the circumstances it might be helpful to the Court and I certainly think we would appreciate the opportunity to brief the case and argue it, if that is satisfactory.

The Court: I assume that that will be the line to be followed. How much time do you want for briefs?

Mr. Ralston: Your Honor, I assume that it will take approximately three weeks, in view of the fact I would like to have the testimony transcribed before we write the brief. I would therefore ask your Honor that we be permitted to present our brief——

The Court: Let's settle the question of a transcript first. The transcript won't be very long, even the whole of it. Are you ordering the transcript?

Mr. Lowry: Yes, your Honor.

(Discussion in re time for preparing transcript.)

The Court: All right. I will set 10 days for delivery of the transcript. Then how much time do you want from that?

Mr. Ralston: Until September 15th, your Honor.

The Court: All right.

Mr. Lowry: Then I would like to have one month, your Honor, because this material has to go to Washington. [114]

The Court: Yes. October 15th for your brief, and a reply brief in 10 days thereafter, or October

25th. At that time, if I feel it is necessary, I shall order an oral argument, after all the briefs are in.

Mr. Lowry: Thank you very much.

The Court: If I don't, I will go ahead and decide the case. After I see all the briefs if I feel there is a necessity for oral argument I will order it and advise you and set a convenient time.

I appreciate the care with which this pre-trial order has been prepared. It seems to me it is very well done, and I compliment counsel.

(Whereupon proceedings in the above matter on said day were concluded.) [115]

Reporter's Certificate

I, John S. Beckwith, an Official Reporter of the above-entitled Court, do hereby certify that on August 4 and 5, 1953, I reported in shorthand the proceedings had in the above-entitled matter; that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages numbered 1 to 115, both inclusive, constitutes a full, true and accurate transcript of said proceedings so reported by me in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 13th day of August, 1953.

/s/ JOHN S. BECKWITH,
Official Reporter.

[Endorsed]: Filed February 11, 1954.

EXHIBIT No. 8

Yo. Aud. Files

Denver Avenue Underpass

Prime Contract No. HA(ORE-35053)cph-101

Contract

Between Kaiser Company, Inc., "Contractor"
and

Tower Sales & Erecting Company, "Subcontractor"

Portland, Oregon—October 20, 1942

Agreement

This Agreement, Made and entered into this 20th day of October, 1942, by and between Kaiser Company, Inc., a Nevada Corporation, (Portland Yard), hereinafter called the "Contractor," and Tower Sales & Erecting Company, a Corporation, 6100 N. E. Columbia Boulevard, Portland, Oregon, hereinafter called the "Subcontractor,"

Witnesseth:

Whereas, the Contractor has heretofore entered into a contract dated August 1, 1942, with the United States of America (hereinafter called the "Owner"), represented by the Federal Public Housing Authority, (hereinafter called the "authority"), being Contract No. HA (Ore-35053) cph-101, (hereinafter called the "Principal Contract"), for the construction of certain housing units together with necessary school and other public build-

Exhibit No. 8—(Continued)

ings and utilities (all of the aforesaid being hereinafter called the “Facilities”), in the vicinity of Portland, Oregon; and

Whereas, Subcontractor has read and is familiar with each and every part of said Principal Contract and the respective rights, powers and benefits and liabilities of the Contractor and the Authority thereunder; and

Whereas, it is the desire of the parties hereto that Subcontractor shall perform certain work in connection with the construction of the Facilities;

Now, Therefore, in consideration of the premises and the compensation as hereinafter provided to be paid by the Contractor to the Subcontractor and the mutual covenants, agreements and conditions hereinafter contained, the parties hereto agree as follows:

Article I.

Statement of the Work

The Subcontractor shall in the shortest possible time furnish the labor, materials, tools, machinery, equipment, facilities, supplies, and services not furnished by the Contractor or the Authority and do all things necessary for the construction and completion of, and shall construct and complete the following:

A highway underpass under Denver Avenue north of the City of Portland in Multnomah County, Ore-

Exhibit No. 8—(Continued)

gon, providing access to and egress from the Facilities. The work to be performed shall include:

(1) The construction and maintenance (during the construction period) of temporary traffic detour bridges and the dismantling thereof upon completion of the construction period;

(2) The obtaining, transportation and placing of all necessary fill material;

(3) The performance of all necessary grubbing and clearing work;

(4) The placing of all necessary curbing and the paving and finishing of ramps to the underpass;

(5) The performance of all other items of work shown in Exhibit "A" mentioned in Article V hereof.

all of the foregoing being herein called the "Work."

Any labor, materials, tools, machinery, equipment, facilities, supplies or services furnished to Subcontractor by Contractor in connection with the performance hereof will be billed to and paid by the Subcontractor at cost or the reasonable market value thereof, whichever the Contractor elects.

Such Work shall be executed in the best and most workmanlike manner by qualified, careful and efficient workers in strict conformity with Oregon State Highway Commission Plans and Specifications Nos. 7778 and 7779, which plans and specifica-

Exhibit No. 8—(Continued)

tions are by this reference incorporated in this contract as fully as though set forth herein.

The Subcontractor shall complete the work by the 12th day of December, 1942. The time of completion shall be extended by the time during which Subcontractor is delayed in said work by the acts of omission or commission of Contractor, or the employees or agents of Contractor, or the acts of God, or the elements, which Subcontractor could not reasonably foresee and provide against, or other causes beyond Subcontractor's control, including strikes, boycotts, or like obstructive action by employees or labor organizations, or lock-outs or other defensive action by other employers, whether general or individual, or by an organization of other employees, or by the order, regulation or action of any government or acting authority. Subcontractor shall not be entitled to and hereby waives any and all damages which it may suffer by reason of Contractor hindering or delaying Subcontractor in the progress of said work, or any portion thereof or from any cause whatsoever.

As a condition precedent to the award of any order or contract hereunder, the Subcontractor shall obtain the approval of the Authority or its duly authorized representative, and upon the approval of the Authority or its duly authorized representative the Subcontractor may award orders or contracts upon the basis of market or negotiated prices. There shall be no mingling of purchases covering

Exhibit No. 8—(Continued)

materials or services required under this contract and those required by the Subcontractor for other work.

Article II.

No Representations to Subcontractor

It is distinctly understood and declared by the Subcontractor that this agreement is made for the consideration herein named and that the Subcontractor has, by careful examination, satisfied Subcontractor as to the nature and location of the work, the conformation of the ground, the character, quality and quantity of the materials to be encountered, the character of equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can in any way affect the work under this agreement. No verbal agreement or conversation with any officer, agent or employee of the Contractor, shall affect or modify any of the terms or obligations herein contained.

Article III.

Inspection

All materials and workmanship furnished in the performance of this Contract shall be subject to inspection and test by the Contractor, the Authority and the Oregon State Highway Commission, at any and all times during the manufacture or construction and at any and all places where such manufacture or construction is carried on. The

Exhibit No. 8—(Continued)

Authority and the Oregon State Highway Commission acting by and through the Contractor shall have the right to reject materials and workmanship determined to be defective, and require correction or replacement thereof, at the Subcontractor's expense, if the defect is due to the act, neglect or default of the Subcontractor or its agents or employees.

Article IV.

Changes

The Authority or its duly authorized representatives may, by written order, approve changes in or additions to the Work to be performed hereunder, provided, however, that in all such cases Contractor and Subcontractor shall value or appraise such changes in a fair and reasonable manner, and add to or deduct from the amount herein agreed to be paid to Subcontractor at pro rata rates, but in no case shall such changes be made unless notice in writing is given to Subcontractor by Contractor.

Article V.

Compensation

Contractor agrees to pay Subcontractor for all work performed hereunder in conformance with said plans and specifications, the following amounts, to wit:

See attached payment schedule marked Exhibit "A" and by this reference made a part hereof.

Exhibit No. 8—(Continued)

Some of the quantities and amounts shown in the said Exhibit "A" have been estimated for the purpose of determining the approximate contract price of this agreement. The actual quantities of work performed hereunder may be more or less than those herein stated, and it is agreed that payment shall be made for the actual quantities of work performed under the items shown in the said Exhibit "A" multiplied by the stated unit prices, if any. The amount to be paid for "lump sum" items shall not vary, regardless of the actual quantities of work performed under such items.

Article VI.

Terms of Payment

Payment of the compensation provided for in Article V hereof will be made monthly in accordance with the progress of the work and estimates thereof prepared by the Engineering Department of the Contractor, less 10%. The remaining 10% shall be included in the final payment; provided, however, that such final payment shall not be made until to the satisfaction of the Contractor, all liens or attachments which have been filed or levied in connection with the work provided for herein are satisfied and discharged of record. The Contractor's calculations of such estimates shall be final, conclusive and binding upon Subcontractor.

Exhibit No. 8—(Continued)

Article VII.

Acceptance of Work

It is mutually agreed that no payment made under this agreement, except the final payment shall be evidence of the performance of this agreement either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Article VIII.

Insurance and Bond

If requested by Contractor, Subcontractor shall furnish at its own cost and expense, two separate bonds, one for "Performance" coverage in the amount of 50% of the contract price, and the other for "Payment" coverage in the amount of 50% of the contract price, the two together being equal to 100% of the contract price. The latest revision of Government Standard Form 25 ("Performance") and Form 25-A ("Payment") shall be used, and the bonds shall be issued by a bonding company on the approved list of the Treasury Department (Form 356). The Federal Public Housing Authority as well as the Contractor shall be named as Obligee on the bonds. Such Bonds shall be furnished, if required by Contractor, before any work is commenced under this contract.

Subcontractor shall procure, carry and maintain

Exhibit No. 8—(Continued)

on all of its operations hereunder, such policies of insurance, in such amounts and insuring against such risks as Contractor may require. Such policies shall include, without limitation, Workmen's Compensation Insurance, Public Liability and Property Damage Insurance, and Automobile Public Liability and Property Damage Insurance. Such policies shall be in such form and shall be issued by such company or companies as may be satisfactory to Contractor. Subcontractor shall pay all premiums on such insurance and on the bonds herein referred to. Subcontractor shall carry Workmen's Compensation Insurance with the Industrial Accident Commission of the state of Oregon. Subcontractor shall furnish to Contractor within 10 days after the commencement of work hereunder five (5) certificates of insurance from the insurance companies or carriers providing the aforementioned insurance coverage. Such certificates shall provide for at least ten (10) days' notice of cancellation, such cancellation notice to be given by either party to the insurance contract to the Contractor. All of such policies of insurance shall carry endorsements by the terms of which Contractor and the Authority as their interest may appear, shall be deemed additional insureds.

Article IX.

Title to Facilities

Title to the Facilities, even though said Facilities are affixed to realty belonging to or leased by an-

Exhibit No. 8—(Continued)

other, completed or in the course of construction, shall be in the Owner. In the event title to any materials, tools, machinery, equipment, and supplies purchased to become a part of said Facilities is transferred from the vendor, or supplier prior to delivery at the site or on approved storage site, such title shall, upon such transfer, vest in the Owner. Title to any such materials, machinery, or equipment ordered from any vendor or supplier to the extent that the Contractor, Owner or Subcontractor makes payment therefor, even though such vendor or supplier has not made delivery thereof at the site of the Facilities, nor completed the Work required of him with respect thereto shall vest also in the Owner. These provisions as to title being vested in the Owner shall not operate to relieve the Subcontractor from any duties imposed under the terms of this Contract.

The Work shall be positively and adequately identified. The Subcontractor shall record the interest of the Owner, as may be required by the Authority in the Work and in such materials, tools, machinery, equipment, and supplies, and shall take all necessary steps to give to third parties notice of such interest. The Subcontractor will also, upon request of the Authority, execute and deliver to the Authority such deeds, bills of sale or other instruments as the Authority may deem necessary to transfer or confirm to the Owner title to all such property or any other rights of the Authority or Owner hereunder in respect to the Work.

Exhibit No. 8—(Continued)

Article X.

Liens

Subcontractor expressly agrees to discharge at once all liens which may be filed in connection with said Work and hold Contractor and the Authority and the owners of the premises upon which the Work is to be performed, harmless therefrom. In the event that Subcontractor fails to satisfy said liens, Contractor, upon five (5) days' written notice may satisfy said liens and deduct the cost thereof from any money due Subcontractor from Contractor, or may demand and receive payment therefor from Subcontractor.

Article XI.

Subcontractor to Remove Debris and Materials

Upon termination or completion of said work, Subcontractor shall remove all debris and waste material and leave the premises in a neat and clean condition, all to the satisfaction of Contractor. Scrap and other material of value not incorporated in the facilities shall be turned over to or left with Contractor.

Article XII.

Subcontractor Not Agent of Contractor

In the execution of the work provided for herein, Subcontractor shall operate as an independent Contractor, and not as the agent of the Contractor.

Exhibit No. 8—(Continued)

It is expressly agreed that Subcontractor shall hold Contractor free and harmless from all liability of every kind and nature, and from all claims for damages by reason of any act or representation of Subcontractor, its agents or employees, and Subcontractor hereby covenants and agrees to indemnify and save Contractor harmless from all costs and expenses growing out of any such claim or liability.

Article XIII.

Taking Over or Stopping of Work

Should Subcontractor at any time during the progress of the work fail, or refuse, or neglect to supply sufficient labor, tools, implements, equipment, machinery or materials, or properly skilled workmen to complete same with reasonable diligence and dispatch, except when due to circumstances which Subcontractor cannot be reasonably expected to control, as provided in Article I hereof, and should such failure, neglect, or refusal continue for five (5) days after written notice shall have been served by Contractor on Subcontractor, Contractor is hereby given the right to take over the said work and complete it. The cost to Contractor of doing such work or the amount Contractor has agreed herein to pay Subcontractor therefor, whichever is the greater, shall be deducted from any moneys due Subcontractor, under this agreement, and if such cost or amount exceeds any such moneys due Sub-

Exhibit No. 8—(Continued)

contractor, Subcontractor agrees to reimburse Contractor for such excess.

Contractor hereby reserves the right to stop said work and terminate this contract at any time upon written notice, it being understood, however, that in any such event, except as provided in the next preceding paragraph of this Article, Contractor shall pay Subcontractor for all work done in conformity with this agreement and the said plans and specifications, plus a reasonable amount, if any, to be determined by Contractor, representing loss, Subcontractor would in such event sustain through money expended or necessary to be expended by Subcontractor as a result of the inability to complete the work contemplated. In the event of such stoppage if work and termination of this agreement, the consideration provided in this paragraph shall be paid within forty-five (45) days after the date of the said written notice; provided, however, that in any event, final payment shall not be made until all liens, stop notices or attachments which have been filed or levied in connection with the work provided for herein, are satisfied and discharged of record.

Article XIV.

Patents

The Subcontractor shall hold and save the Contractor, and the Owner, their officers, agents, servants and employees harmless from liability of any nature or kind, including costs and expenses, for

Exhibit No. 8—(Continued)

or on account of the use or manufacture of any patented or unpatented invention, article, or appliance manufactured or used in the performance of this Contract, including their use by or for the Government after installation; Provided, however, that this requirement shall not be construed to extend to anything supplied by the Owner or the Contractor, or which the Owner or Contractor might direct Subcontractor to purchase in connection with this contract.

Article XV.

Eight-Hour Law—Overtime Compensation

No laborer or mechanic doing any part of the work contemplated by this Contract, in the employ of the Subcontractor or others shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this Article. The wages of every laborer and mechanic employed by the Subcontractor or others engaged in the performance of this Contract shall be computed on a basic day rate of eight hours per day, and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this Article a penalty of \$5.00

Exhibit No. 8—(Continued)

shall be imposed upon the Subcontractor or other person for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said Work without receiving compensation computed in accordance with this Article, and all penalties thus imposed shall be withheld for the use and benefit of the Government; Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, Title 40, Secs. 321, 324, 325, and 326, relating to hours of labor, as in part modified by the provisions of Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

Article XVI.

Convict Labor

(a) The Subcontractor shall not employ upon the Work covered by this Contract any person undergoing sentence of imprisonment at hard labor.

(b) **Qualifications for Employment.** There shall be no discrimination because of race, creed, color, national origin or political affiliations, in the employment of persons for Work on the Project.

Article XVII.

Affidavit Concerning Rates of Pay for Labor

(a) The Subcontractor will comply with the provisions of Public Act No. 324, 73rd Congress,

Exhibit No. 8—(Continued)

approved June 13, 1934, (48 Stat. 948) and with the provisions of the regulations issued by the Secretary of Labor thereunder, entitled, "Regulations Applicable to Contractors and Subcontractors on Public Building and Public Work and on Building and Work Financed in whole or in part by Loans or Grants from the United States," published in the Federal Register March 1, 1941.

(b) This Contract is subject to the provisions of the Act of June 25, 1936, (40 U. S. C. 290), entitled, "An Act to provide more adequate protection to workmen and laborers on projects, buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several states jurisdiction and authority to apply their State workmen's compensation laws on all property and premises belonging to the United States of America."

(c) The Subcontractor shall pay all mechanics and laborers employed on Work under this Contract and directly upon the site of the Work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those which may be determined by the Secretary of Labor pursuant to the provisions of the Act approved March 3, 1931, (46 Stat. 1494) to be the prevailing rates for the various classes of such laborers and

Exhibit No. 8—(Continued)

mechanics; and the scale of wages to be paid shall be posted by the Subcontractor in a prominent and easily accessible place at the site of the Work. The Contractor shall have the right to withhold from the Subcontractor so much of accrued payments as may be considered necessary by the Authority to pay to laborers and mechanics employed by the Subcontractor on the Work the difference between the rates of wages required by the Contract to be paid laborers and mechanics on the Work and the rates of wages received by such laborers and mechanics and not refunded to the Subcontractor or his agents. The Contractor will furnish the Subcontractor with the wage scale determined by the Secretary of Labor as aforesaid, and until such wage scale is so furnished, the Subcontractor shall be under no obligations under the provisions of this paragraph.

Article XVIII.

Domestic Preference

In the performance of the Work covered by the Contract, the Subcontractor, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; the foregoing provision shall not

Exhibit No. 8—(Continued)

apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the Department under the proviso of Title III, Section 3 of the Act of Congress, approved March 3, 1933, (41 U. S. C. 10).

Article XIX.

Not Transferable

This Contract shall not, nor shall any interest therein, be transferred by the Subcontractor to any other person or persons without the approval of the Contractor.

Article XX.

Fees

The Subcontractor warrants that he has not employed any person to solicit or secure this Contract upon any agreement for a commission, percentage, brokerage, or fee contingent or otherwise. Breach of this warranty shall give the Contractor the right to terminate the Contract, or in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or fee. This warranty shall not apply to commissions payable by Subcontractors upon contracts or

Exhibit No. 8—(Continued)

sales secured or made through bona fide established commercial or selling agencies maintained by the Subcontractor for the purpose of securing business.

Article XXI.

Officials Not to Benefit

No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this Contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this Contract if made with a corporation for its general benefit.

Article XXII.

Disputes

Except as otherwise specifically provided in this Contract, if any doubts or disputes arise concerning any question hereunder or as to anything in the plans or specifications, or if any discrepancy appears between said plans or specifications and this Contract, the matter shall be referred at once to the Federal Public Housing Commissioner for determination; and his decision in the premises shall be conclusive and binding upon the parties hereto.

Article XXIII.

Prohibition Against Employment of
Certain Persons

(a) As a condition to the employment by the Subcontractor of any person to perform any of the

Exhibit No. 8—(Continued)

Work contemplated by this Contract and who will be paid from any funds made available under this Contract, the Subcontractor shall, if the Contractor or the Authority so directs, require such person to execute and to file an affidavit in such form as to satisfy the requirements of Public Law No. 5 (77th Congress), but the execution and filing of such affidavit shall be without prejudice to the right of the Contractor or the Authority to require such further evidence in the premises as it may deem desirable.

(b) The Authority may require the removal or discharge of any person employed in or about the Work if it is determined that the employment of such person is detrimental to the performance of the Work under this Contract.

Article XXIV.

Liability

Except as otherwise provided herein, Subcontractor expressly agrees to indemnify and save the Contractor and the Authority harmless from and against any and all claims, loss, damage, injury and liability howsoever same may be caused resulting directly or indirectly from work covered by this contract.

Article XXV.

Attorney's Fees

In case Contractor shall bring suit to compel performance of or to recover for breach of any

Exhibit No. 8—(Continued)

covenant, agreement, or condition herein written, Subcontractor agrees to pay Contractor such sum as the court may adjudge to be reasonable as attorney's fees.

Article XXVI.

Notices

All notices given to the parties hereunder shall be directed to their business addresses first hereinabove stated. All such notices shall be deemed properly given by depositing the same in any United States Post Office in an envelope with postage thereon prepaid, directed to the parties hereto at such addresses.

Article XXVII.

Application of Principal Contract to
Subcontractor

In his performance of this Contract, Subcontractor shall be subject to and shall comply with all the applicable provisions and conditions of the Principal Contract.

Article XXVIII.

Overtime Compensation

(a) The Subcontractor agrees to perform the work on the basis of a three-shift day without shutdown on Saturdays, Sundays, or other holidays.

(b) The wages of every laborer and mechanic engaged in work on the Project shall be computed

Exhibit No. 8—(Continued)

on a basic day rate of eight hours per day. When a single shift is employed, eight hours of continuous employment, except for lunch periods, shall constitute a day's work. When two or more shifts are employed, seven and one-half hours of continuous employment, except for lunch periods, shall constitute a day's work. (Wherever practicable shifts shall be rotated.)

Article XXIX.

Authority's Representative

Any decision or determination required to be made by the Owner or the Authority will be made by the representative of the Authority located at the site of the Project.

Article XXX.

Contract Subject to Approval by Authority

This Contract shall not become effective unless and until it is approved by the Authority.

In Witness Whereof, the parties hereto have executed this Contract as of the day and year first above written.

KAISER COMPANY, INC.,
Portland Yard;

By /s/ A. R. NUMAN,
Asst. Gen. Mgr.,
Contractor.

Exhibit No. 8—(Continued)

Witnessed by:

/s/ MARY K. MOORE.

TOWER SALES & ERECTING
COMPANY,

By /s/ C. FISHER,
President,
Subcontractor.

Witnessed by:

/s/ ROSEMARY ALEXANDER.

Approved:

GOV'T REP.,

By /s/ A. A. PIERSON,
F. P. H. A.

EXHIBIT "A"

Item No.	Description	Quantity	Unit Price	Total
1.	Furnishing Fir peeled piling..	4,400 Ft.	\$.40	\$ 1,760.00
2.	Driving piling.....	63 only	45.00	2,835.00
3.	Furnishing in place all lum- ber in permanent bridge.....	126,000 Ft.	100.00	12,600.00
4.	Furnishing Detour Bridge in place.....	1 only Lump Sum		10,000.00
5.	Removal of Detour Bridge.....	1 only Lump Sum		3,000.00
6.	Install Traffic Lights and Signs and maintain traffic.....	All Req'd. Lump Sum		2,000.00
7.	Removal of old pavement on top of new bridge.....	710 Sq. Yds.	1.00	710.00
8.	Excavation for Underpass Bridge as shown on Drawing No. 7778.....	7,000 Yds.	1.50	10,500.00
9.	Removal of concrete curb.....	3,200 Ft.	.50	1,600.00
10.	Remove 12 light standards and reinstall 110 volt light cir- cuit per State Specification....	All Req'd. Lump Sum		1,500.00
11.	Fill material delivered in place. Payment based on truck measure.....	80,000 Cu. Yd.	1.10	88,000.00
12.	Furnishing in place gravel sub-base material. Payment based on truck measure.....	2,500 Cu. Yd.	2.00	5,000.00
13.	Furnish in place armour coat oil surfacing.....	9,000 Sq. Yd.	1.00	9,000.00
14.	Remove and reinstall concrete curb on West side of Denver Ave. to allow for detour bridge.....	300 Ft.	2.00	600.00
15.	Furnish and install concrete divider strip.....	700 Lin. Ft.	1.00	700.00
16.	Concrete in place as ordered..	30 Cu. Yd.	35.00	1,050.00
17.	Furnish and install 18 in. culvert.....	300 Lin. Ft.	4.00	1,200.00
18.	Clearing trees and brush, East side of Denver Ave. in fill areas.....	All Req'd. Lump Sum		1,500.00
19.	Cleaning up of site.....	All Req'd. Lump Sum		1,000.00

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 12

Oregon Shipbuilding Corporation
Portland, Oregon

August 28, 1942.

State Highway Commission,
State of Oregon,
Salem, Oregon.

Gentlemen :

Kaiser Company, Incorporated, under contract to The Maritime Commission, has started construction on a housing project to house six thousand families. This project will lie on the west side of Denver Avenue just north of the Columbia Slough.

At the present time, there is contemplated only the construction of two entries from this project, both on the west side of Denver Avenue. Due to the volume of traffic that will daily go in and out of this project, plus the heavy traffic on Denver Avenue at present, this is not felt safe or adequate.

We therefore request the State Highway Department to build entrance roads to this project leading from the east side of Denver Avenue to the project by means of an underpass. We would appreciate it if this construction could be done now while the houses are under construction and, before the matter has become further complicated by the flow of traffic in and out of this area.

We would appreciate an early reply from you on

this subject stating your position; and, if favorable, any information we might have on how we could be of assistance to you.

Respectfully,

/s/ JOHN E. MEAD,

Housing Administrator.

JEM:en

[Stamped]: Received August 29, 1942.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 13

September 1, 1942.

Mr. John E. Mead,
Housing Administrator,
Oregon Shipbuilding Corporation,
Portland, Oregon.

Dear Sir:

Confirming phone conversation in reply to your letter of August 28, advise that the project you desire, consisting of an underpass on Denver Avenue with approach ramps in the various quadrants to permit the construction of a traffic interchange eliminating cross traffic at grade, should be initiated by Admiral Freeman through the Public Roads Administration.

This department will be very glad to design the structure and to contract its construction, provided

that it is certified as an access road project and federal funds are provided for the cost of the work.

Very truly yours,

R. H. BALDOCK,
Chief Engineer.

RHB:HI

Received October 9, 1942.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 14

September 12, 1942.

Mr. T. G. Donaca, Secretary,
Peninsula Drainage District No. 1,
811 American Bank Building,
Portland, Oregon.

Dear Sir:

The Oregon State Highway Commission, in cooperation with the Federal Housing Authority, has under consideration the construction of a traffic interchange at the point where the access road to the housing development in Peninsula Drainage District No. 1 enters Denver Avenue about 150 yards north of Columbia Slough. This traffic interchange will necessitate cutting through the Denver Avenue embankment. It is our understanding that the continuing of the Denver Avenue embankment as a dike is of no further interest to your district.

This is to advise you of our tentative plans and to further advise you that the State is under no obligation to maintain the road grade as a dike facility in any respect.

Very truly yours,

R. H. BALDOCK,
Chief Engineer.

GSP:CM

cc: G. S. Paxson.

Received September 15, 1942.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 15

October 10, 1942.

Law Offices of
Ivan F. Phipps
1226 American Bank Building
Portland, Oregon

Oregon State Highway Commission,
Salem, Oregon.

Attention: Mr. R. H. Baldock, Chief Engineer

Gentlemen:

Under date of September 12, 1942, you addressed a letter to Mr. T. G. Donaca, Secretary, Peninsula Drainage District Number One, stating that the Commission has under consideration an underpass under the Denver Avenue Approach to the Inter-

state Bridge; and further, that the State is under no obligation to maintain the road grade as a dike facility.

In order that the Peninsula Drainage District Number One may determine its attitude upon this proposed cutting of its dike protection, it is requested that you kindly furnish us a copy of your proposed plan. Such an underpass may be constructed without injury to the District's protection against flood waters by the construction of a suitable flood wall or bulkhead, and we trust that you are prepared to protect the District in this manner.

Since the District was established with Denver Avenue as one of its dikes, and the proceeding under which the District was organized was regularly advertised and approved by the Circuit Court, it would seem that Multnomah County, and the State of Oregon as successor to Multnomah County's rights and obligations in connection with the maintenance of the highway, are definitely under a legal duty not to impair or weaken the District's dikes or to endanger the property within the District. In any event the District desires to examine your tentative plans for the proposed underpass, and will advise you as to its position in the matter as soon as such plans have been received and examined.

Yours very truly,

/s/ IVAN F. PHIPPS,

President, Peninsula Drainage District Number One.

Received October 13, 1942.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 16

October 13, 1942.

Mr. Ivan F. Phipps, President,
Peninsula Drainage District Number One,
1226 American Bank Building,
Portland, Oregon.

Dear Sir:

In accordance with your request of October 10, I am sending, under separate cover, a print showing the general location and arrangement of the proposed traffic interchange at the Denver Avenue Housing Project. I am also sending prints from our Drawings No. 7778 and 7779 showing the plans for the structure itself.

Very truly yours,

R. H. BALDOCK,
Chief Engineer.

GSP:CM

cc: G. S. Paxson.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 17

Oregon State Highway Commission
Salem

October 20, 1942.

Mr. Ivan F. Phipps, President,
Peninsula Drainage District No. 1,
1226 American Bank Building,
Portland, Oregon.

Dear Mr. Phipps:

I have just been handed by the Highway Engineer a copy of your letter addressed to him under date of October tenth with respect to the proposal of the Highway Commission to construct an underpass for traffic beneath the Denver Avenue approach to the Interstate Bridge.

In your letter you indicate that it is your position that the State is responsible for any damage which the District may sustain by reason of the construction of the underpass. I cannot accept your theory that the State is in any way responsible to the irrigation district for any damage which may flow from the Highway Commission's proposed plan and purpose.

The structure through which it is proposed to make the underpass is a highway grade and has always been such since its construction. It is my opinion that no use of such highway grade by an irrigation district imposes any liability on the State or the Highway Department; and, therefore, until I am otherwise convinced, I shall advise the High-

way Commission that it may, without liability, use the Denver Avenue approach which is a highway grade for any use consistent with and which contributes to public travel and public convenience.

I don't want to appear arbitrary in this matter, but unless there is a clear liability resting on the Highway Commission it cannot use state highway funds for anything other than highway purposes and I have so advised the Commission.

Yours very truly,

J. M. DEVERS.

JMD:PW

cc: Henry F. Cabell,
C. B. McCullough,
G. S. Paxson,
H. G. Smith.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 18

F. T. YOUNG
Acting

October 30, 1942.

Mr. Jerry Kelly,
Engineer,
Kaiser Company,
Portland, Oregon.

Dear Sir:

Am handing you herewith specifications dated October 28, 1942, for the construction of the Den-

ver Avenue Housing Project Road Approaches to the Pacific Highway West (N. Denver Avenue).

Also, am furnishing you, for your guidance, a copy of Standard State Highway Specifications for Highway Construction, dated September 15, 1940, and Specifications and Contract Agreement for Highway Bridge Construction, dated August 1, 1939.

At a previous time, I have furnished you with the following:

Map of Road Layout into Project, Drawing 6B-6-4, dated October, 1942.

Standard Structure Plans, Drawing 2050.

Profiles of Road Approaches, dated October, 1942.

Standard Plans for Frame Trestle, Drawing 7586.

Preliminary Estimate of Quantities.

Plans for Underpass Structure, Drawings 7778 and 7779.

Typical Roadbed Sections, October, 1942.

Plan of Traffic Separators, September, 1942.

In accordance with our understanding, the State is to have an inspector on all work within the limits of the State Right of Way, or pertaining to Denver Avenue Crossing, Trestle Detour, and Approach Roads.

If, at any time, I can be of assistance to you personally, please feel free to call upon me.

Very truly yours,

F. T. YOUNG,

Acting Division Engineer.

FTY:IH—Encl.

cc: H. G. Smith.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 22

Oregon State Highway Commission

F. T. Young

Acting

November 16, 1942.

Mr. Jerry Kelly,

Room 136, Administration Building,

Kaiser Company, Inc.,

Swan Island,

Portland, Oregon.

Dear Sir:

Under separate cover, am mailing you two copies, each, of the profiles of approach roads, typical sections, and vicinity map, drawing 6B-6-4, all in connection with the proposed underground crossing to the Denver Avenue Housing Project.

Very truly yours,

F. T. YOUNG,

Acting Division Engineer.

FTY:IH

Encl.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 23

Permit

Whereas, Kaiser Company, Inc., and the Oregon Shipbuilding Corporation are engaged in the construction of ships and other facilities for the United States Government in or near Portland, Oregon, and in connection with said operations and activities large numbers of persons are employed; and

Whereas, existing housing accommodations and highway facilities are inadequate for the accommodation of the thousands of people employed by said corporations; and

Whereas, the Federal Public Housing Authority is engaged in the construction of a housing project (Project No. ORE-35053) for the use and accommodation of persons employed by the said corporations; and

Whereas, in connection with said housing project and in cooperation with the State Highway Commission there has been designed by the Highway Commission and is being constructed by the Federal Public Housing Authority a highway project which requires the construction of an underpass beneath Denver Avenue, which is a state highway under the jurisdiction of the State Highway Commission; and

Whereas, the State Highway Commission recognizes the urgent need of the early completion of said highway facilities, including said underpass;

Now, Therefore, a permit is hereby granted to the Federal Public Housing Authority for the construction of an underpass within the right of way and beneath the roadbed of Denver Avenue, but subject, however, to the following conditions and provisions:

1. Said underpass shall be constructed at state highway engineer's station 66+90.66.

2. Said underpass shall have an unimpaired vertical clearance of fifteen feet and an unimpaired horizontal clearance of twenty-six feet for each traffic lane.

3. The structure and appurtenant facilities shall be built in accordance with plans, specifications and design prepared by the Highway Commission, copies of which, consisting of two sheets, are attached hereto and by this reference made a part hereof.

4. The State shall at its expense provide an inspector or inspectors who shall be present during the construction of said project and shall inspect and supervise the work.

5. The permittee may construct said underpass and appurtenant facilities with its own forces or by contract or such other method as may best suit the convenience of the permittee.

6. During construction the permittee shall cause proper and adequate protection to be maintained at all times for the safety of the members of the public using or having lawful occasion to be on or about Denver Avenue.

7. After said structure has been completed it shall be maintained by the State, but the permittee shall reimburse the State for all expenditures made in connection with such maintenance of the structure and appurtenant facilities within the state highway right of way; provided, however, that the permittee's obligation to maintain said structure or reimburse the State for its maintenance shall not extend beyond the duration of the war; and provided that reimbursements shall be for actual expenditures only, and in no event shall maintenance cover any part of the project which is outside of the state highway right of way.

8. By accepting this permit the permittee shall thereby assume the obligations herein specified.

Dated this 5th day of November, 1942.

OREGON STATE HIGHWAY
COMMISSION.

By /s/ HARVEY F. CABELL,
Chairman;

By /s/ [Indistinguishable],
Commissioner;

By /s/ HERMAN OLIVER,
Commissioner.

Attest:

/s/ [Indistinguishable],
Secretary.

Approved:

/s/ [Indistinguishable],
State Highway Engineer.

Acceptance of Permit

The undersigned Federal Public Housing Authority hereby accepts the foregoing permit and assumes the obligations therein imposed on it and agrees to conform to the same.

Dated this 12th day of November, 1942.

FEDERAL PUBLIC HOUSING
AUTHORITY,

By /s FRANK M. CRUTSINGER,
For the Federal Public
Housing Commissioner.

JMD:PW

11/2/42.

EXHIBIT No. 24

August 25, 1943.

George H. Buckler, Contractor,
Attention Mr. Harold Goodland,
Lewis Building,
Portland, Oregon.

Dear Sirs:

Regarding furnishing clay blanket on dike, Denver Avenue:

I propose and agree to raise dike at entrance to Vanport to elevation of 34.3 and widen top to width of twelve feet, or as required, at the unit price of

\$1.00 per cubic yard. This quotation is based on truck measure.

This quotation is for clay fill material furnished by me and in place on the dike with proper slopes, and top compacted with bulldozer.

Respectfully submitted.

FC/mby

8/25/43—Award. \$50.00 extra for clearing. No grubbing.

George H. Buckler—Contractor
Portland, Oregon

Confirming

Requisition: No. 6234

Date: August 25, 1943.

To: Fred Christensen,

Address: 1017 S. E. 34th, Portland, Oregon.

Please Enter Our Order as Follows, Subject to

Conditions Below:

F. O. B.

Terms: Net

Ship to: George H. Buckler, Contractor,
704 Lewis Bldg.,
Portland, Oregon.

1. Cash discount period to be extended if necessary to return invoices for correction of errors, or

failure to submit required number of copies, by the time consumed in returning such invoices. Terms and discount rate to be shown on invoice.

2. The right to cancel this order is reserved if the material specified is not shipped at the time promised.

3. We will pay no extra charge for packing, loading or draying.

4. This order is placed subject to delays or cancellation occasioned by accident, strikes, fires or other causes beyond the control of either party.

5. All conditions of United States Statutes applicable to sales of merchandise for use on United States contracts must be complied with by the vendor.

6. In accepting this order, vendor agrees to the terms and conditions above.

Description	Amount
For the delivery in place of approximately 7000 cu. yds. of clay fill material, to meet with the approval of the U. S. Army Engineers. To place material as per plan. Price to be \$1.00 per cubic yard, truck measure.	
Add the sum of \$50.00 for clearing necessary brush at toe of slope.	
All materials to be placed twenty (20) days after notice is given to start.	
Estimated amount for F.P.H.A. purposes	
only	\$8,500.00

300.8h, Additional Work.

Approved:.....

F.P.H.A.

4 copies of all invoices must be submitted referring to the requisition No. Original must have signed certification.

Mail All Invoices in Quadruplicate to: George H. Buckler—Contractor, 704 Lewis Bldg., Portland, Oregon.

Invoices must state order number and point of delivery.

Prices on this order not subject to change.

In accepting this order, seller agree to pay all industrial insurance and unemployment compensation taxes.

GEORGE H. BUCKLER,
Contractor.

By /s/ J. W. WEILER.

George H. Buckler—Contractor
704 Lewis Building
Portland, Oregon

September 26, 1943.

Gentlemen:

Our work in connection with F.P.H.A. Housing Project, ORE-35053B, located at Vanport City, Oregon, is now completed.

The accounting section of the F.P.H.A. has requested that final claims for reimbursement for all material, supplies and services purchased through our firm be filed not later than October 10, 1943.

Therefore, if you have any unpaid claims pertinent to the above referred to project, it is requested that you mail us detailed statements therefore, in quadruplicate, to reach us not later than October 10, 1943.

Failure to receive a statement from you by that date will indicate that any and all claims for your account have been paid in full, and we will be governed accordingly.

Very truly yours,

GEORGE H. BUCKLER,
Contractor.

By /s/ J. W. WEILER,
Field Auditor.

WTR:el

[Endorsed]: August 5, 1953.

EXHIBIT No. 25

(Copy)

Fred Christensen
Contractor
1017 S. E. 34th Avenue
Portland 15, Oregon

Sept. 25, 1943.

In Account With

George H. Buckler—Contractor,
704 Lewis Building,
Portland, Oregon.

Your Order No.: 6234.

Inv. No.: B-4240.

Job Location: Dike at entrance to Vanport.

Items	Quantity	Rate	Amount
Clay fill in place	8425 yds.	1.00	8,425.00
Clearing			50.00
			<hr/>
			8,475.00

I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transaction have been complied with; and that State or local taxes are not included in the amounts billed.

.....,

Owner.

Paid 10/19/43.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 26

[Endorsed]: Filed August 5, 1953.

In the County Court of the State of Oregon
for the County of Multnomah

No. 34

In the Matter of:

THE ORGANIZATION OF PENINSULA
DRAINAGE DISTRICT NUMBER TWO

ORDER ORGANIZING DISTRICT

Sept. 24, 1917.

At this time, in accordance with the order of the court heretofore made, comes on to be heard the petition in the matter of the organization of Drainage District No. Two, of R. H. Brown, C. C. Colt, B. C. Darnall, Kenwood Land Company (a corporation), R. W. Schmeer, A. M. Wright, Columbia Valley Trust Company (a corporation), Merchants Loan & Investment Company (a corporation), Peninsula Industrial Company (a corporation), River-ton Land Company (a corporation), Swinton Land Company (a corporation), Portland Trust Company of Oregon (a corporation), L. G. Sontag, B. E. Cameron, R. M. Walton and J. W. Hill, all the said petitioners appearing in open court by Carey and Kerr, their attorneys, and upon the objections to the organization of the said district made and filed by Green C. Love and Leonard

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Gertz, and it appearing to the satisfaction of the Court that in accordance with the order, due and legal notice of the hearing of the said petition has been given and published in the manner required by law, by the County Clerk of Multnomah County, by publication of such notice, together with copy of the petition aforesaid, once each week for four successive weeks in *The Daily Record-Abstract*, a newspaper published in Multnomah County, Oregon, in which are situate the lands of the proposed drainage district, to wit, from the 9th day of August, 1917, to the 6th day of September, 1917, inclusive; and that the last insertion and publication thereof was more than fifteen days prior to the time for this hearing of the said petition, and due proof of the publication aforesaid has been filed; and the court being satisfied that the notice and proof thereof is in all respects regular and in accordance with the law, and that this Court has original and exclusive jurisdiction of the said drainage district and of the said proceedings, and that no person other than said Love and said Gertz has objected to the organization or incorporation of the said drainage district, and at this time the petitioners having presented the said petition and evidence in support thereof, and the said Love and the said Gertz having also appeared and offered evidence against the petition, and the Court being satisfied after due consideration, that the said Peninsula Drainage District Number Two should be

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organized and the petition should be allowed, and the prayers of the petitioners should be granted; and that said objections should be overruled;

The Court therefore finds that the petition is in due form and it contains the allegations sufficient and necessary to confer jurisdiction, and also makes its findings upon the facts alleged in the petition and other facts necessary and proper for the determination of the propriety of the organization of the said district, which are as follows:

1. The boundary lines of the said district and a description of all lands included therein are as follows:

Beginning at the northeast corner of John Switzler donation land claim in section two (2), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south along the east line of John Switzler donation land claim 1422 feet to the center line of McBride Slough; thence following center line of McBride Slough, more definitely described by following meanders: north $75^{\circ} 30'$ east 300 feet, south $44^{\circ} 50'$ east 1018.9 feet, south $18^{\circ} 37'$ east 921.3 feet, south $25^{\circ} 37'$ west 400 feet, south $15^{\circ} 57'$ west 800 feet, south $37^{\circ} 43'$ west 300 feet, south $40^{\circ} 05'$ west 700 feet, south $50^{\circ} 25'$ west 300 feet, south $52^{\circ} 23'$ west 200 feet, south $44^{\circ} 25'$ west 200 feet, south $40^{\circ} 31'$ west 99.8 feet, south $34^{\circ} 30'$ west 288 feet, south $19^{\circ} 26'$ west 200 feet, south $9^{\circ} 7'$ west 430 feet, to the intersection of McBride

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Slough with Columbia Slough; thence down stream and westerly following along low water line of Columbia Slough more definitely described in the following meanders: south $56^{\circ} 10'$ west 147.4 feet, south $69^{\circ} 45'$ west 107 feet, south $75^{\circ} 14'$ west 450 feet, north $84^{\circ} 11'$ west 58 feet, south $88^{\circ} 53'$ west 240 feet, north $67^{\circ} 58'$ west 1327.7 feet to the north-east corner of Lewis Love donation land claim, north $61^{\circ} 37'$ west 1878.9 feet to the center line of Love Slough; north $83^{\circ} 51'$ west 399.6 feet, south $71^{\circ} 37'$ west 102.2 feet, south $39^{\circ} 30'$ west 630 feet, south $66^{\circ} 07'$ west 200 feet, north $78^{\circ} 11'$ west 335 feet, north $58^{\circ} 45'$ west 942.8 feet, north $68^{\circ} 12'$ west 268.7 feet, south $63^{\circ} 26'$ west 615 feet, north $56^{\circ} 50'$ west 776.5 feet, north $68^{\circ} 12'$ west 538.5 feet, north $80^{\circ} 33'$ west 608.3 feet, north $78^{\circ} 40'$ west 369.0 feet, north $62^{\circ} 56'$ west 1000.0 feet more or less to the east line of the right of way of the Derby Street approach to the Interstate Bridge; thence northerly and easterly following along the east line of said right of way, 450 feet along a 6° curve to the right whose chord bears north $8^{\circ} 30'$ east, thence still following along the east line of said right of way north $11^{\circ} 32'$ east 5290.0 feet to its intersection with the west line of the right of way of the Union Avenue approach to the Interstate Bridge, thence continuing north $11^{\circ} 32'$ east across the Union Avenue approach 150 feet more or less to the east line of the right of way of Union Avenue approach, thence following along the east

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line of right of way of Union Avenue approach 300 feet more or less to the north line of G. W. Force donation land claim; thence south 71° east along the north line of said claim 464.8 feet south 70° east 574.2 feet to the northwest corner of J. R. Switzler donation land claim; thence south 71° east 3320.0 feet to the northwest corner of John Switzler donation land claim; thence south $79^{\circ} 50'$ east $7781\frac{1}{2}$ feet to the northwest corner of that half acre tract owned by Portland Railway Light & Power Company, thence south $87^{\circ} 47'$ east 150 feet to low water line of Columbia River, thence following along the low water line of Columbia River south 78° east 1750 feet, north $76^{\circ} 54'$ east 386.9 feet, north 85° east 156 feet, south 89° east 115 feet, east 1150 feet, south 87° east 770 feet to the east line of John Switzler donation land claim; thence south 164 feet more or less to point of beginning, containing 1519.3 acres.

All of the above-described lands constitute a contiguous body of swamp, wet and overflowed lands.

2. The total acreage included in the said lands and to be included in the district aforesaid is fifteen hundred nineteen and three-tenths (1519.3) acres, and the said land lies wholly within Multnomah County, Oregon.

3. The names of the owners of the above-described land to be included in the said district, as shown by the records of the County of Multnomah,

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and the acreage owned by each of such owners, respectively, are as follows:

(1) R. H. Brown is the owner of the following-described land:

Beginning at a point on the west line of the Jos. R. Switzler donation land claim 1039.5 feet from the southwest corner of said claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence north $0^{\circ} 24'$ east along the west line of said claim line 1700 feet; thence south 71° east 3280.0 feet more or less to the east line of claim; thence south along east claim line 1160.0 feet more or less; thence north $71^{\circ} 56'$ west 1800.0 feet to an iron pipe on south shore of Force Lake; thence along south shore of lake as follows: South $89^{\circ} 16'$ west 164.7 feet, north 58° west 198.0 feet; south $82^{\circ} 30'$ west 297.0 feet, south 72° west 339.0 feet and north 87° west 462.0 feet to point of beginning, subject to the rights of the public in the highway known as Union Avenue approach to the Interstate Bridge, the tract herein described, after deducting the area so excepted, containing 90.2 acres.

(2) C. C. Colt is the owner of the following-described land:

Beginning at a point on the west line of the Jos. R. Switzler donation land claim 4339.5 feet from the southwest corner of said claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence north $0^{\circ} 24'$

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east along the west line of said claim 1600 feet more or less to the northwest corner of said claim; thence south 71° east 3320.0 feet more or less, to the northeast corner of said claim; thence south along the east line of claim line 9.2 feet to the north line of River Boulevard of Bridgeton; thence along the north side of River Boulevard as follows: North $77^{\circ} 31'$ west 637.0 feet; thence north $73^{\circ} 31'$ west 730.11 feet to the east side of the Portland Railway Light & Power Company's right of way; thence south $21^{\circ} 0.5'$ east along the right of way 331.2 feet; thence along the south line of Bridgeton as follows: south $77^{\circ} 31'$ east 52.2 feet, south $12^{\circ} 29'$ west 25 feet, south $77^{\circ} 31'$ east 245 feet, south $12^{\circ} 29'$ west 50 feet, south $77^{\circ} 31'$ east; thence 635.0 feet north $12^{\circ} 29'$ east 25 feet, south $77^{\circ} 31'$ east 145.0 feet, north $12^{\circ} 29'$ east 25 feet, south $77^{\circ} 31'$ east 156.8 feet to the east line of Jos. R. Switzler donation land claim; thence south along the east line of said claim 1336.6 feet more or less; thence north 71° west 3300 feet more or less to point of beginning, subject to the rights of the public in the highway known as Union Avenue approach to the Interstate bridge and the right of way of the Portland Railway Light and Power Company mentioned below, the tract herein described, after deducting the area so excepted, containing 98 acres.

(3) B. C. Darnall is the owner of the following-described land:

Beginning at a point on the west line of the Jos.

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R. Switzler donation land claim 2739.5 feet from the southwest corner of said claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon, thence north $0^{\circ} 24'$ east along the west line of said claim 1600 feet; thence south 71° east 3300 feet more or less to the east line of said claim, thence south along the east line of claim 1600 feet, thence north 71° east 3280 feet more or less to point of beginning, subject to the rights of the public in the highway known as Union Avenue approach to the Interstate bridge and the right of way of the Portland Railway Light and Power Company mentioned below, the tract herein described, after deducting the area so excepted, containing 105.8 acres.

(4) E. F. Day is the owner of the following-described land:

Beginning at the northwest corner of the Lewis Love donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon, said point being also northeast corner of J. Rankin donation land claim; thence north $89^{\circ} 55\frac{1}{4}'$ west along the north line of J. Rankin donation land claim 9.75 chains; thence north .03 chains; then south $89^{\circ} 55\frac{1}{4}'$ east 281.16 feet; thence north 1232.36 feet to the south margin of Force Lake; thence along meanders of lake south 66° east 277.7 feet, south 80° east 3.7 chains to the west line of Jos. R. Switzler donation land claim; thence south $0^{\circ} 24'$ west 17.25 chains to the south-

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west corner of Jos. R. Switzler donation land claim; thence north $71^{\circ} 37'$ west 130.58 feet to point of beginning, containing 13 acres.

Also Beginning at a point on the north line of J. Rankin donation land claim which bears north $89^{\circ} 55\frac{1}{4}'$ west 9.45 chains distant from the northeast corner of the J. Rankin donation land claim, section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south 400 feet more or less to low water line of Columbia Slough; thence westerly along the low water line of Columbia Slough to a line which running north $.0^{\circ} 01\frac{1}{4}'$ west and south $.0^{\circ} 01\frac{1}{4}'$ east is 467.6 feet west of the point of beginning; thence north $.0^{\circ} 01\frac{1}{4}'$ east 360 feet more or less to north line of the J. Rankin donation land claim; thence south $89^{\circ} 55\frac{1}{4}'$ east along the J. Rankin donation land claim 467.6 feet to point of beginning, containing 3.7 acres.

(5) Leonard Gertz is the owner of the following-described land:

Beginning at a point on the north line of Perry Baker donation land claim and center line of that slough known as McBride Slough, said point being 16 chains east of the northeast corner of Perry Baker donation land claim in section two (2), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence following along the center line of McBride Slough south $18^{\circ} 37'$ east 670 feet, south $25^{\circ} 37'$ west 400 feet, south $15^{\circ} 57'$ west 800 feet, south $37^{\circ} 43'$ west 300 feet, south $40^{\circ} 05'$ west

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700 feet, south $50^{\circ} 25'$ west 300 feet, south $52^{\circ} 23'$ west 200 feet, south $44^{\circ} 25'$ west 200 feet, south $40^{\circ} 31'$ west 99.8 feet, south $34^{\circ} 30'$ west 288 feet, south $19^{\circ} 26'$ west 200 feet, south $9^{\circ} 7'$ west 430 feet, to the intersection of Columbia Slough; thence southerly and westerly along the low water line of Columbia Slough to the north line of Wm. McClung donation land claim; thence north 79° west along the north line of Wm. McClung donation land claim to a point 2.8 chains west of the center line of section 11; thence north $.0^{\circ} 5'$ east 5508.7 feet to the southeast corner of block 21, Bridgeton; thence north $.0^{\circ} 5'$ east along the east line of block 21, 358.29 feet more or less to a point 25 feet south of the high bank of Columbia River; thence easterly and up stream 25 feet south of the high bank to the west line of Sarah Wilson donation land claim, said line being 1657.7 feet east of the east line of block 21, Bridgeton; thence south along the west line of Sarah Wilson donation land claim 1287 feet more or less to the center line of McBride Slough; thence following the center line of McBride Slough north $75^{\circ} 30'$ east 300 feet, south $44^{\circ} 50'$ east 1018.9 feet, south $18^{\circ} 37'$ east 251.3 feet to point of beginning, containing 300 acres.

(6) Kenwood Land Company (a corporation) is the owner of the following-described land:

Beginning at a point on the north line of John Rankin donation land claim said point being north $89^{\circ} 55\frac{1}{4}'$ west 1090.98 feet of the northeast corner of John Rankin donation land claim in section ten

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(10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence north 1101.24 feet to the center line of Force Lake; thence following along the center line of Force Lake south $77^{\circ} 21'$ west 531 feet, south $39^{\circ} 32'$ west 2.7 chains, south $49^{\circ} 38'$ west 2.6 chains, west 2 chains; thence south $52^{\circ} 42'$ west to the east line of the Derby Street approach to the Interstate bridge; thence southerly following along the east line of the Derby Street approach 450 feet more or less to low water line of Columbia Slough; thence southerly and easterly along low water line of Columbia Slough to a line which running south $0^{\circ} 11\frac{1}{4}'$ east and north $0^{\circ} 11\frac{1}{4}'$ west is 467.6 feet west of the point of beginning; thence north $0^{\circ} 11\frac{1}{4}'$ west 145 feet more or less to north line of John Rankin donation land claim; thence south $89^{\circ} 55\frac{1}{4}'$ east 467.61 feet to point of beginning, containing 19 acres.

(7) Hazel King, William King, Thelma Shepard, James Shepard, Pearl Shepard, a minor, and H. H. Northup, as guardian of Pearl Shepard, a minor, are the owners of the following-described land:

Beginning at the northwest corner of the Lewis Love donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south $71^{\circ} 37'$ east 130.58 feet to the southwest corner of Joseph R. Switzler donation land claim; thence north $0^{\circ} 24'$ east along

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west line of Joseph R. Switzler donation land claim 1039.5 feet, to the south margin of Force Lake; thence along the meanders of lake south 87° east 462 feet; north 72° east 266.7 feet; thence south 2050 feet more or less to the low water line of Columbia Slough; thence northerly and westerly along low water line of Columbia Slough to the west line of Lewis Love donation land claim; thence north following the west line of Lewis Love donation land claim 500 feet more or less to point of beginning, containing 30 acres.

(8) Green C. Love is the owner of the following-described land:

Beginning at a point which is 1678.6 feet east 984.6 feet north of the northwest corner of Lewis Love donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south $71^{\circ} 56'$ east 793.11 feet; thence south 2100 feet more or less to the low water line of Columbia Slough; thence northerly and westerly following along the low water line of Columbia Slough to a point which is 1678.6 feet east of the west line of Lewis Love donation land claim; thence north 1860 feet more or less to point of beginning, containing 34.4 acres.

(9) Merchants Loan & Investment Company (formerly Merchants Loan & Trust Company), a corporation, is the owner of the following-described land:

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Beginning at the northeast corner of the J. Rankin donation land claim in section ten (10), township one (1) north, range one (1) east, Wilamette Meridian, Oregon; thence south along the east line of the J. Rankin donation land claim 500 feet more or less to low water line of Columbia Slough; thence northerly and westerly along low water line of Columbia Slough to a point 4.725 chains west of the east line of the J. Rankin donation land claim; thence north 400 feet more or less to the north line of the J. Rankin donation land claim; thence south $89^{\circ} 55\frac{1}{4}'$ east 4.725 chains to point of beginning, containing 2.9 acres.

(10) Peninsula Industrial Company, a corporation, is the owner of the following-described lands:

Beginning at the northeast corner of John Switzler donation land claim in section two (2), township one (1) north, range one (1) east, Wilamette Meridian, Oregon; thence north 164 feet more or less to low water line of Columbia River; thence westerly and down stream following the low water mark of Columbia River, north 87° west 770 feet, west 1150 feet, north 89° west 115 feet, south 85° west 156 feet, south $76^{\circ} 54'$ west 286.9 feet, north 78° west 1750 feet, to the northeast corner of that half acre tract owned by the Portland Railway Light & Power Company; thence south $19^{\circ} 53'$ west 45 feet more or less to the north side of River Boulevard, Bridgeton; thence southerly and easterly

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following along the north line of River Boulevard to the east line of Bridgeton; thence easterly along the high bank of Columbia River to the east line of John Switzler donation land claim; thence north along claim line 115 feet more or less to point of beginning, containing 21 acres.

Also Beginning at a point on the west line of John Switzler donation land claim and the south line of block 6, Bridgeton, which point is 263.4 feet south of the northwest corner of John Switzler donation land claim in section three (3), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence southerly and easterly along the south boundary line of Bridgeton to the southeast corner of block 21, Bridgeton, which point is also south $0^{\circ} 5'$ west 381.09 feet from the northwest corner of Leonard Gertz tract; thence south $0^{\circ} 5'$ west 5890 feet more or less to the north line of William McClung donation land claim; thence north 79° west along the north line of William McClung donation land claim 400 feet more or less to low water line of Columbia Slough; thence northerly and westerly following low water line of Columbia Slough to the intersection of Columbia Slough with the center line of that slough known as Love Slough; thence along center line of Love Slough north $18^{\circ} 10'$ west 248.5 feet, north 21° east 590 feet, north 19° west 430 feet; thence north 72° west 224.4 feet; thence north $71^{\circ} 56'$ west 527.6 feet to the west line of John Switzler donation land claim; thence north along the west line of John Switzler

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donation land claim 4096.6 feet more or less to point of beginning, subject to the right of way of the Portland Railway Light & Power Company mentioned below, the tract herein described, after deducting the area so excepted, containing 430.9 acres.

Also Beginning at a point on the west line of Joseph R. Switzler donation land claim and center line of Force Lake which point is north $0^{\circ} 24'$ east 30.11 chains from the southwest corner of Joseph R. Switzler donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence following along the center line of Force Lake south $89^{\circ} 16'$ west 3.6 chains, south $55^{\circ} 52'$ west 6.8 chains, south $30^{\circ} 20'$ west 3 chains, south $40^{\circ} 16'$ west 5.6 chains, south $49^{\circ} 38'$ west 2.5 chains, south $77^{\circ} 21'$ west 10 chains, south $39^{\circ} 32'$ west 2.7 chains, south $49^{\circ} 38'$ west 2.6 chains, west 2 chains; thence south $52^{\circ} 42'$ west to the east line of Derby Street approach; thence north $11^{\circ} 32'$ east along the east line of Derby Street approach 5290.0 feet to its intersection with the west line of the right of way of the Union Avenue approach to the Interstate Bridge, thence continuing north $11^{\circ} 32'$ east across the Union Avenue approach 150 feet more or less to the east line of the right of way of Union Avenue approach, thence following along the east line of right of way of Union Avenue approach 300 feet more or less to the low water line of North Portland Harbor; thence southerly and easterly following along low water line to northwest corner of Joseph R. Switzler

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donation land claim; thence south $0^{\circ} 24'$ west along the west line of Joseph R. Switzler donation land claim 3952.3 feet more or less to point of beginning, subject to the rights of the public in the highway known as the Union Avenue approach to the Interstate Bridge, the tract herein described, after deducting the area so excepted, containing 163.7 acres.

(11) Portland Railway Light & Power Company (a corporation), is the owner of the following-described land:

Beginning at a point which is south $79^{\circ} 50'$ east 778.5 feet from the northwest corner of John Switzler donation land claim in section three (3), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south $19^{\circ} 53'$ west 150 feet to an iron pipe; thence $87^{\circ} 47'$ east 149.86 feet to an iron pipe; thence north $19^{\circ} 53'$ east 150 feet; thence north $87^{\circ} 47'$ west 149.86 feet to point of beginning, containing $5/10$ of an acre.

Also a right of way described as follows:

(a) A strip of land 30 feet in width being 15 feet on each side and parallel with the center line thereof. Beginning at the quarter corner between sections ten (10) and eleven (11) in township one (1) north, range one (1) east, Willamette Meridian, thence north 411 feet to a point which is also north $71^{\circ} 56'$ west 1304.5 feet from the northeast corner of the Lewis Love donation land claim, thence westerly following a curve to the left having a radius of 716.8 feet a distance of 100 feet more or

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less to the center line of the right of way and low water line of the north bank of Columbia Slough, which point is the point of beginning of land to be described.

Beginning at the above said point, thence westerly following a curve to the left having a radius of 716.8 feet, a distance of 169.2 feet to a point; thence tangent with said curve and north $21^{\circ} 05'$ west following along the center line of the present right of way 2262.2 feet more or less to a point in the line between the lands formerly owned by Alice M. Tomasini and Geo. W. Force, containing 2.2 acres.

(b) A strip of land 70 feet in width being 35 feet on each side and parallel with the center line thereof. Commencing at the above said point in the line between the lands formerly owned by Alice M. Tomasini and Geo. W. Force, thence continuing along the same center line north $21^{\circ} 05'$ west 4612.3 feet more or less to a point in the center of the present Portland Railway Light & Power Company's right of way and the north boundary line of the J. R. Switzler donation land claim, containing 7.4 acres.

(12) Riverton Land Company (a corporation) is the owner of the following-described land:

Beginning at a point which is 2432.6 feet east and 733.7 feet north of the northwest corner of Lewis Love donation land claim in section ten (10), township one (1) north, range one (1) east, Wil-

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lamette Meridian, Oregon; thence south $71^{\circ} 56'$ east 1357.67 feet; thence south 72° east 224.4 feet to the center line of that slough commonly known as Love Slough; thence following along the center line of slough south 19° east 430 feet; thence south 21° west 590 feet; thence south $18^{\circ} 10'$ east 248.5 feet to the intersection of Love Slough and Columbia Slough; thence following along the low water mark of Columbia Slough north $83^{\circ} 51'$ west 399.16 feet, south $71^{\circ} 37'$ west 102.3 feet, south $39^{\circ} 30'$ west 630 feet, south $66^{\circ} 07'$ west 200 feet, north $78^{\circ} 11'$ west 335 feet, north $58^{\circ} 45'$ west to a point 2432.6 feet east of the west line of Lewis Love donation land claim; thence north 2100 feet more or less to point of beginning, subject to the rights of the public in the highways known as the Union Avenue approach and the Vancouver Avenue approach to the Interstate Bridge, and the right of way of the Portland Railway Light & Power Company mentioned above, the tract herein described, after deducting the area so excepted, containing 57.45 acres.

(13) R. W. Schmeer and A. M. Wright are the owners of the following-described land:

Beginning at a point on the south margin of Force Lake which point bears north 1252.15 feet and north $89^{\circ} 55\frac{1}{4}'$ west 362.3 feet from the northeast corner of John Rankin donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence following along the meanders of lake north 66° west

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78.71 feet south 10° west 132 feet, south 78° west 138.6 feet, south 34° west 369.6 feet, south 60° west 132 feet, south 82° west 179.06 feet; thence north 374.2 feet to center line of Force Lake; thence following center line of Force Lake north $77^{\circ} 21'$ east 129 feet; north $49^{\circ} 38'$ east 2.5 chains, north $40^{\circ} 16'$ east 5.6 chains, north $30^{\circ} 20'$ east 3 chains, north $55^{\circ} 52'$ east 167.6 feet; thence south 432.8 feet to point of beginning, containing 6.6 acres.

Also Beginning at a point on the west line of Joseph R. Switzler donation land claim on the south margin of Force Lake which point is north $0^{\circ} 24'$ east 17.25 chains from the southwest corner of Joseph R. Switzler donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence along the south margin of Force Lake north 80° west $3/7$ chains, north 66° west 277.7 feet; thence north 532.8 feet to center line of Force Lake; thence along the center line of Force Lake north $55^{\circ} 52'$ east 281.2 feet; north $89^{\circ} 16'$ east 3.6 chains to west line of Joseph R. Switzler donation land claim; thence south $0^{\circ} 24'$ west along the west line of Joseph R. Switzler donation land claim 848.76 feet to point of beginning, containing 8.2 acres.

(14) F. Stenzel is the owner of the following-described land:

Beginning at a point on the north line of J. Rankin donation land claim which bears north $89^{\circ} 55\frac{1}{4}'$ west 4.725 chains distant from the northeast

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corner of J. Rankin donation land claim in Section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south 400 feet more or less to low water line of Columbia Slough; thence westerly along the low water line of Columbia Slough to a point which is 9.45 chains west of the east line of J. Rankin donation land claim; thence north 400 feet more or less to north line of J. Rankin donation land claim; thence south $89^{\circ} 55\frac{1}{4}'$ east 4.725 chains to point of beginning, containing 2.8 acres.

(15) Swinton Land Company (a corporation) is the owner of the following-described land:

Beginning at a point in the meander line on the south margin of Force Lake which point is 846.5 feet east and 1062.7 feet north of the northwest corner of the Lewis Love donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence along the meanders of Force Lake north 72° east 63.3 feet, north $82^{\circ} 30'$ east 297 feet, south 58° east 198 feet, north $89^{\circ} 16'$ east 164.7 feet; thence south $71^{\circ} 56'$ east 176.82 feet; thence south 1860 feet more or less to the low water line of Columbia Slough; thence westerly along the low water line of Columbia Slough to a point 846.5 feet east of the west line of Lewis Love donation land claim; thence north 2050 feet more or less to point of beginning, containing 38.1 acres.

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(16) Edwin G. MacGrouther is the owner of the following-described land:

Lot one (1), Chambreau's Factory Site Add. to the City of Portland, Multnomah County, State of Oregon, as shown by the recorded plat thereof, containing 1.14 acres.

(17) Columbia Valley Trust Company (a corporation) is the owner of the following-described land:

Lots two (2) to nineteen (19), inclusive, Chambreau's Factory Site Add. to the City of Portland, Multnomah County, State of Oregon, as shown by the recorded plat thereof, containing 15.24 acres.

(18) Wm. J. Tippins is the owner of the following-described land:

East thirty-one (31) feet of lot one (1), block one (1), and lot one (1), block three (3), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.102 acres.

(19) R. T. Driskill and Hattie Driskill are the owners of the following-described land:

Lots six (6) and seven (7), block one (1), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.127 acres.

(20) Gertrude Weston is the owner of the following-described land:

Lot one (1), block two (2), Bridgeton, Multno-

Exhibit No. 26—(Continued)

mah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(21) C. E. Taylor is the owner of the following-described land:

Lot two (2), block two (2), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(22) Minnie Schweitzer is the owner of the following-described land:

Lots three, four and five (3, 4 & 5), block two (2), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.17 acres.

(23) Myrtle M. Tracy is the owner of the following-described land:

Lot six (6), block two (2), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.055 acres.

(24) W. E. Strauhl is the owner of the following-described land:

Lots seven and eight (7 & 8), block two (2), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.11 acres.

(25) Jessie Merz Manas, Jeannette Merz Manas, Jessie Merz Manas, as Administratrix of the Estate of Henry Merz and the Estate of Henry Merz, deceased, are the owners of the following-described land:

Exhibit No. 26—(Continued)

Lots nine (9) and eleven (11), block two (2), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(26) M. E. Herrick is the owner of the following-described land:

Lot seven (7), block three (3), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.055 acres.

(27) J. N. Hoffman is the owner of the following-described land:

Lots one (1) and two (2), block four (4), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(28) Carl Oscar Nilsson and Ida Nilsson are the owners of the following-described land:

Lots three (3) to six (6), inclusive, block four (4), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.23 acres.

(29) R. H. Tennison is the owner of the following-described land:

Lots seven and eight (7 & 8), block four (4), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(30) Geo. N. Spencer is the owner of the following-described land:

Lots three (3) and four (4), block five (5),

Exhibit No. 26—(Continued)

Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(31) Mary E. Barden is the owner of the following-described land:

Lot seven (7), block five (5), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(32) B. L. Woodworth is the owner of the following-described land:

Lot eight (8), block five (5), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(33) Portland Trust Company of Oregon (formerly Portland Trust & Savings Bank), a corporation, and Mrs. Linda Iola Ford are the owners of the following-described land:

Lots one and two (1 & 2), block six (6), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(34) B. E. Cameron is the owner of the following-described land:

Lot eight (8), block six (6), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(35) Alma Walton and R. M. Walton are the owners of the following-described land:

Lot one (1), block seven (7), Bridgeton, Multno-

Exhibit No. 26—(Continued)

mah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(36) Mary Ellen Sullivan is the owner of the following-described land:

Lot three (3), block seven (7), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(37) Mary Ellen Sullivan and Arthur W. Sullivan are the owners of the following-described land:

Lot four (4), block seven (7), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(38) Sara M. Sullivan is the owner of the following-described land:

Lot five (5), block seven (7), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(39) Sara M. Sullivan and Timothy W. Sullivan are the owners of the following-described land:

Lot six (6), block seven (7), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(40) J. W. Hill is the owner of the following-described land:

Lots seven (7) and eight (8), block seven (7),

Exhibit No. 26—(Continued)

Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(41) David Galet is the owner of the following-described land:

Lots one and two (1 & 2), block eight (8), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(42) Louie G. Sontag is the owner of the following-described land:

Lots three (3) to six (6), inclusive, nine (9) and ten (10), block eight (8), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.345 acres.

(43) Wm. J. McClure is the owner of the following-described land:

Lots three and four (3 & 4), block ten (10), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(44) District School Board of District No. 33, Multnomah County, Oregon, is the owner of the following-described land:

Lots nine (9) to sixteen (16), inclusive, block fifteen (15), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.91 acres.

(45) Wm. A. Cowles is the owner of the following-described land:

Exhibit No. 26—(Continued)

Lots one and two (1 & 2), block twenty-one (21), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof containing 0.15 acres.

(46) Portland Trust Company of Oregon (formerly Portland Trust & Savings Bank), a corporation, is the owner of the following-described land:

Lot one (1) except the east thirty-one (31) feet thereof, and all of lots two (2) to five (5), inclusive, and eight (8) to eleven (11), inclusive, block one (1); lots ten (10) and twelve (12) to eighteen (18), inclusive, block two (2); lots two (2) to six (6), inclusive, and eight (8) to twenty (20), inclusive, block three (3); lots nine (9) to twenty (20), inclusive, block four (4); lots one (1), two (2), five (5), six (6) and nine (9) to nineteen (19), inclusive, block five (5); lots three (3) and four (4) to seven (7), inclusive, and nine (9) to sixteen (16), inclusive, block six (6); lot two (2), block seven (7); lots nine (9) to eighteen (18), inclusive, block seven (7); lots seven (7), eight (8) and eleven (11) to twenty-six (26), inclusive, block eight (8); lots one (1) to thirty (30), inclusive, block nine (9); lots one (1), two (2) and five (5) to thirty-one (31), inclusive, block ten (10); lots one (1) to thirty-two (32), inclusive, block eleven (11); lots one (1) to thirty-two (32), inclusive, block twelve (12); lots one (1) to thirty-two (32), inclusive, block thirteen (13); lots one (1) to thirty-two (32), inclusive, block fourteen (14); lots one (1) to eight

Exhibit No. 26—(Continued)

(8), inclusive, and seventeen (17) to thirty-two (32), inclusive, block fifteen (15); lots one (1) to thirty-four (34), inclusive, block sixteen (16); lots one (1) to thirty-four (34), inclusive, block seventeen (17); lots one (1) to thirty-two (32), inclusive, block eighteen (18); lots one (1) to thirty-one (31), inclusive, block nineteen (19); lots one (1) to thirty (30), inclusive, block twenty (20); lots three (3) to eleven (11), inclusive, block twenty-one (21); lots one (1) to eight (8), inclusive, block twenty-two (22); lots one (1) to ten (10), inclusive, block twenty-three (23); lots one (1) to fourteen (14), inclusive, block twenty-four (24); lots one (1) to fourteen (14), inclusive, block twenty-five (25); lots one (1) to fifteen (15), inclusive, block twenty-six (26); all in Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 31.13 acres.

4. There is included in the said district the dedicated streets and roads in Chambreau's Factory Site Add. to the city of Portland and in Bridgeton, as shown by the plats thereof, and the railroad right of way of the Portland Railway, Light & Power Company hereinbefore described, and also the highways described as follows:

(1) Union Avenue Approach to the Interstate Bridge: A strip of land 80 feet in width being 40 feet on either side of the present center line of the Union Avenue Approach described as follows:

(a) Beginning at a point in the north line of

Exhibit No. 26—(Continued)

the land owned by the Riverton Land Company in section 10, township 1 north, range 1 east, Willamette Meridian, which is described in book 454, page 354, record of deeds for Multnomah County, Oregon, which point is south $71^{\circ} 56'$ east 765 feet more or less measured along the said north line from the intersection of the said north line and the east and west line between section 10 and section 3, township 1 north, range 1 east, Willamette Meridian, thence south $22^{\circ} 12'$ east 1600.0 feet more or less to the low water line of the north side of Columbia Slough, containing 2.93 acres.

(b) A strip of land 40 feet on each side of a center line described as follows:

Beginning at a point in the center line of the present Union Avenue approach to the Interstate Bridge and the north line of the land owned by the Riverton Land Company in section 10, township 1 north, range 1 east, Willamette Meridian, which is described in book 454, page 354, record of deeds for Multnomah County, Oregon, which point is south $71^{\circ} 56'$ east 765 feet more or less measured along the said north line from the intersection of the said north line and the east and west line between section 10 and section 3, township 1 north, range 1 east, Willamette Meridian; thence north $22^{\circ} 12'$ west 1810 feet; more or less along the present center line of fill; thence on a 3° curve to the left 717 feet; thence north $43^{\circ} 42'$ west 3889.0 feet more or less along the present center line of fill; thence on a curve of 13° to the right 200 feet more or less until it inter-

Exhibit No. 26—(Continued)

sects the east line of right of way of the Derby Street approach produced, containing 12.3 acres.

(2) Vancouver Avenue approach to the Interstate Bridge: A strip of land 20 feet in width being 10 feet on each side and parallel therewith, and being the center line of the present pile trestle being part of the old Vancouver road, and now known as the Vancouver Avenue approach to the Interstate Bridge. Commencing at a point on the low water line on the north bank of the Columbia Slough which point is 487.6 feet south and 356.7 feet west of the southwest corner of the John Switzler donation land claim situated in section 10 of township 1 of range one east, Willamette Meridian, Oregon, and running thence north $10^{\circ} 42'$ east 1558.4 feet more or less to its intersection with the westerly line of right of way of the Union Avenue approach to the Interstate Bridge, containing .72 acres.

The total acreage of all of said streets and highways and said railroad right of way is 41.77 acres, and the same will not be beneficially affected by the proposed improvement. All of the other lands in the said district above described and to be included in the said proposed district are and should be properly included therein and will be beneficially affected by the operation of the proposed district.

5. The said district is to be organized for the construction, operation and maintenance of a drainage system and the reclamation of the said lands

Exhibit No. 26—(Continued)

and the protection thereof from overflow of the Columbia River and the Columbia Slough, and the proposed reclamation and protection aforesaid is for both sanitary and agricultural purposes, and will be conducive to the public health and welfare and will be of public utility and benefit.

6. The benefits of such proposed reclamation and protection will exceed the damage to be done, and the best interests of the land aforesaid to be included in the district and of the owners of such land as a whole, and of the public at large, will be promoted by the formation and proposed operations of such district.

7. The formation of a drainage district under the provisions of the laws of Oregon is a proper and advantageous method of accomplishing the reclamation and protection of the lands aforesaid to be included therein.

8. The proposed plan of reclamation and protection is to provide, where necessary, proper and suitable dikes to prevent the overflow of the Columbia River and Columbia Slough, and to drain the lands by ditches or otherwise, supplementing the said works by pumping plants or other methods of affording drainage and protection as may be best suited to accomplish the purpose. The said lands in general are bottom lands lying between the Columbia Slough and the Columbia River, which said slough is a tributary of and connected with the Columbia River. The said lands are partly pro-

Exhibit No. 26—(Continued)

tected from overflow by dikes upon or near the boundaries thereof, and the proposed plan will include such additional dikes and works as will be deemed necessary.

9. All of the petitioners have agreed that they will pay any and all expenses incurred and any tax or taxes that may be levied against their lands, respectively, for the purpose of paying the expense of organizing or attempting to organize the proposed district.

It Is Therefore Ordered, Declared and Decreed, that the said Peninsula Drainage District Number Two shall be organized and created, and shall include each and all of the parcels of land herein described and described in the said petition, and as particularly described by metes and bounds in finding numbered one herein, said area consisting of fifteen hundred nineteen and $\frac{3}{10}$ (1519.3) acres, more or less.

It Is Further Ordered that the county clerk within thirty days after this date, proceed to call a meeting of the owners of the land situate in the said district, for the purpose of electing a board of three supervisors thereof, and shall give notice thereof in the manner prescribed by law.

Dated September 24, 1917.

/s/ GEORGE TAGWELL,
County Judge.

EXHIBIT No. 27

No. 34

REPORT OF PHILIP H. DATER

Chief Engineer, to the Board of Supervisors of
Peninsula Drainage District Number Two.
Dated November 5th, 1917.

This report approved and adopted by the Board
of Supervisors of Peninsula Drainage District Num-
ber Two at its meeting held November 9, 1917.

/s/ R. H. BROWN,
Secretary, Board of
Supervisors.

Portland, Oregon.
November 5, 1917.

To the Board of Supervisors,
Peninsula Drainage District No. 2,
North Portland, Oregon.

Gentlemen:

Herewith in compliance with instructions, I sub-
mit Engineers Report on the Drainage and Reclaim-
ing of lands in the above-mentioned Drainage Dis-
trict, setting forth the interior drainage system
necessary to effect a removal of surface waters and
lowering of water plane and delivery of said water
to the main disposal plant and gate systems, also

Exhibit No. 27—(Continued)

outlining the plant necessary to care for maximum rainfall conditions during the high water, and a system of levees to protect against overflow during spring freshets in the Columbia River. Attached to this report is a contour map, Plat 1, showing the physical characteristics of these lands included in District No. 2. The District has for its west boundary the Derby Street fill of the Interstate Bridge, which also constitutes the east boundary of Peninsula Drainage District No. 1—this fill upon completion of District No. 2 will not act as a dike since District No. 1 will be reclaimed by its west, north, and south levees, connecting with system No. 2. It will, however, constitute an additional element of security to Districts Nos. 1 and 2. The north boundary of the district will be the bank of Oregon Slough and Columbia River. It will be noted by reference to Plat 1 that this ground is comparatively high approximating Elevation 25. It is proposed here to increase this elevation to 28 ft. for a crown width of 20 ft. continuing same as a road on line with the present road or street along this frontage. This material will be placed by a suction dredge and sloped 5 to 1, the river slope being faced with clay and planted to willows. This dike will extend east to an intersection with the east line of Leonard Gertz property.

The land will be protected on the south by a dike constructed along the north bank of Columbia Slough. It will be noted this ground is comparatively high, approximate elevation 15, and dike

Exhibit No. 27—(Continued)

will be formed by dredging material out of bottom of Columbia Slough and placing in embankment with clam shell dredge. This dike will have an eight-foot crown at the 28 ft. elevation, and approximating 3 to 1 slopes. Suitable berm will be left so that sloughing off of shoulder to 1 to 1 slope would still leave ample protection to the dike against under cutting. Its slough slope will be planted to willows and sowed to grass as bank protection. Experience has shown that this material, after placing, is not eroded by current in Columbia Slough during high water. This dike is shown in typical section by Plat 2 and will continue easterly along Columbia Slough to the tributary slough designed as McBride Slough as shown on Plat 1, to the east line of Leonard Gertz property and along this east line to the north dike along the Columbia River above referred to.

It is apparent that this will affect a complete closure of the land included in this district against high water. In addition to this it is proposed to connect up the interior drainage as shown on Plat 1. It will be noted that there exists three major depressions to be drained marked on Plat 1 as A, B and C. "A" has a bottom elevation of approximating 8, and is formed by the Union Avenue fill damming up the natural drainage to same. This is to be drained by a culvert placed through this fill, and thence by natural waterway to Mud Lake. Depression "B" will likewise be connected by pipe through Derby Street fill to drainage in District 1,

Exhibit No. 27—(Continued)

and depression "C" or Switzler Lake has bottom elevation of 4 and will be connected as shown through Union Ave., fill to depression "B." Both depressions "B" and "C" will have smaller independent gates direct to Columbia Slough to affect direct drainage of these areas at low water. Under this plan all the drainage at high water will go to the main pumping station in District 1, and there will be pumped out of the district by the combined plant operated jointly by the two districts, under the construction of District 2. The permanent station will be constructed on District 1, adjacent to the present temporary building and an additional 18-inch pump installed to care for District 2. The combined capacity of the two pumps will be under the 20 ft. head approximating 18,000 gals. per minute, which will be ample to care for rainfall and seepage during high water. During low water the drainage will be by gravity through the gates. The pumps will be electrically operated by 75 H.P. motors and take power from Power line of District 1. There will be included in Peninsula Drainage, District 2, 1519.3 Acres. While some filling will doubtless be advisable by the owners of depression "B" to bring above elevation 5, the majority of this land in District 2 will be readily available for cultivation when drained and protected against spring freshets and will raise all the grass crops, cabbage, kale, grain and prove valuable for dairying.

There will be no work to affect the west closure

Exhibit No. 27—(Continued)

and little to raise the north line to elevation 28, so that but two sides will involve work of much magnitude at such time as District 3 is formed to the east, $\frac{1}{2}$ the cost of this end should be refunded to District 2. Your engineer finds that the embankment will require approximately 400,000 yards of material and that the cost per acre will be approximately \$40.00 per acre. A study of the hydrographs of the Columbia River for a number of years and computation of pumping charges shows that pumping cost will approximate an average cost of 80 cents per acre per year.

Plat 1 shows inside drainage, gates and ditches later to be made by dredge at proper stage of the river.

Respectfully submitted,

/s/ PHILIP H. DATER.

[Endorsed]: Filed January 18, 1918.

[Endorsed]: Filed August 5, 1953, U.S.D.C.

EXHIBIT No. 28

Special Meeting of the Board of Directors of
Peninsula Drainage District Number Two

Portland, Oregon,
September 18, 1942.

A special meeting of the Board of Supervisors
or Peninsula Drainage District Number Two was

held in the offices of the May Hardware Company, 317 S.W. Front Avenue, Portland, Oregon, on Friday, September 18, 1942 at 8:00 p.m., All of the supervisors were present at the meeting as follows:

J. H. MacKenzie

T. G. Donaca

Tony Fazio

The president, J. H. MacKenzie, presided, and the secretary, H. L. Boyles, kept the minutes.

The minutes of the previous meeting were read and approved.

The secretary read a list of warrants Number 2450 to and including Number 2511 which were approved. The list is attached hereto.

The secretary read a letter from the Oregon State Highway Commission regarding the underpass on Denver Avenue. It was decided that the district instruct the secretary to write to the Oregon State Highway Commission and request plans and specifications for the proposed underpass and also express a desire of having the underpass connect with Schmeer Road in order to give through traffic from Denver Avenue to Vancouver Avenue.

The secretary read an option from the State Highway Commission to obtain 250 ft. along the Columbia Slough adjoining the Gault property in order that the Highway Commission could purchase Mr. Gault's property to make an underpass at Denver and Union Avenue bridge.

Mr. Fazio made the following motion which was seconded by Mr. MacKenzie:

“Be It Resolved that Peninsula Drainage District Number Two, owners of a parcel of land lying in the Southwest quarter of the Southwest quarter (SW $\frac{1}{4}$ SW $\frac{1}{4}$) of Section 34, Township 2 North, Range 1 East, and in the Northwest quarter of the Northwest quarter (NW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 3, Township 1 North, Range 1 East, W.M., Multnomah County, Oregon, conveyed by that certain deed to Peninsula Drainage District Number Two, recorded in Book 331, Page 573, of Multnomah County Record of Deeds, give the Oregon State Highway Commission a real estate option to buy 250 feet on the westerly end of said plot of land for and in consideration of the sum to One Thousand Two Hundred Fifty and no/100 Dollars (\$1,250.00).”

The resolution was passed. The only dissenting vote was that of T. G. Donaca.

There was no further business to come before the meeting and it was adjourned.

/s/ H. L. BOYLES,
Secretary.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 29

Annual Meeting of Landowners of Peninsula
Drainage District Number Two

Portland, Oregon,

October 26, 1942.

The annual meeting of the owners of land in Peninsula Drainage District Number Two was held at the schoolhouse of Columbia School District Number 33, Faloma, on the 26th day of October, 1942, at 8:00 p.m.

The following landowners were present in person or represented at the meeting:

	No. Acres
Northwest Properties, Inc., by Ivan F. Phipps, its proxy	44.408
Warren Packing Co., by Ivan F. Phipps, its proxy	245.453
Ivan F. Phipps, in person	1.014
Tony Fazio, in person	282.71
Riverton Land Co., by H. M. Seivert, its proxy	18.40
Robert H. Seivert, by H. M. Seivert	43.63
Columbia River Land Co., by J. H. MacKenzie, its proxy	118.44
J. H. MacKenzie, in person	6.25
Guy Lawrence, in person	7.28
Total acres	767.585

The president of the board of supervisors, J. H. MacKenzie, presided and the secretary, H. L. Boyles, kept the minutes of the meeting.

The minutes of the last annual meeting of the owners of land in the district were read and approved.

The secretary read the financial statement to the landowners concerning the operation and financial condition of the district for the period November 1, 1941, to June 30, 1942. The report was unanimously adopted. A copy of this report is attached.

The president announced the next order of business would be the election of a supervisor to succeed T. G. Donaca to serve for a term of three years. T. G. Donaca was the only candidate nominated and was unanimously elected.

Considerable discussion ensued concerning the underpass between Kaiserville and Peninsula Drainage District Number One and our district. It was decided that the Union Avenue right-of-way has no connection with our district and it is up to the United States Engineers and the State Highway Commission to adjudicate any differences concerning the effect on the drainage by the construction of this underpass.

Mr. Guy Lawrence gave quite a lengthy talk concerning the problems of School District Number 33. He has had several meetings with officials of the city and Government but no definite decision has been made concerning the great increase in

students in this district. The talk was most interesting to the landowners.

The secretary read a letter from Ralph Clyde concerning city bus service to meet the growing demand in School District Number 33 for bringing children to school in the wet and cold weather. The landowners were advised that the supervisors were doing everything in their power to get a bus service for the district.

The president directed the secretary to read a letter from Mr. R. W. Schmeer regarding the drainage and condition of his land. It was decided that this was up to the board of supervisors to adjust in whatever manner they saw fit.

There was no further business to come before the meeting and it was adjourned.

/s/ H. L. BOYLES,
Secretary.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 30

Special Meeting of the Board of Supervisors of
Peninsula Drainage District Number Two

Portland, Oregon,
November 30, 1942.

A special meeting of the Board of Supervisors of Peninsula Drainage District Number Two was held in the offices of the May Hardware Company, 317 S.W. Front Avenue, Portland, Oregon, on

Monday, November 30, 1942, at 8:00 p.m. All of the supervisors were present at the meeting as follows:

J. H. MacKenzie

T. G. Donaca

Tony Fazio

Mr. Ivan F. Phipps, one of the district's attorneys, was also present at the meeting.

The president, J. H. MacKenzie, presided and the secretary, H. L. Boyles, kept the minutes.

The minutes of the previous meeting were read and approved.

Mr. Fazio complained of the heavy water on his farm land due to heavy rains and improper drainage. It was decided that Mr. Fazio would be appointed as a committee of one to make a report to the next meeting of the supervisors on the drainage ditch under Union Avenue and the approximate cost so that it could be provided for in the next budget.

Considerable discussion ensued concerning the underpass at Kaiserville on Denver Avenue. It was decided that our attorney Mr. Phipps write a letter to the Oregon State Highway Commission to see if this matter could not be rectified so that our drainage system would not be disrupted.

Bills were present from attorneys R. R. Bullivant, and Maguire, Shields, Morrison & Biggs in the sums of \$70.00 and \$540.00, respectively, and approved for payment.

Mr. Phipps brought up the subject of the compromise on Mr. Schmeer's undivided 3/10 interest in certain properties in the district against which we have back taxes and interest from the year 1931. After considerable discussion it was decided that the matter should be brought up at a later date because of lack of evidence on the part of the supervisors to enable them to make a decision.

It was suggested that the secretary be instructed to write to the State Highway Commission concerning the construction of a road between Denver Avenue and Vancouver Avenue known as the Schmeer Road as we now have the right-of-ways through all property.

There was no further business and the meeting was adjourned.

/s/ H. L. BOYLES,
Secretary.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 31

Special Meeting of the Board of Supervisors of
Peninsula Drainage District Number Two

Portland, Oregon,
April 19, 1943.

A special meeting of the Board of Supervisors of Peninsula Drainage District Number Two was

held in the offices of the secretary, 426 Davis Building, Monday, April 19, 1943, at 8:00 p.m. All of the supervisors were present at the meeting as follows:

J. H. MacKenzie

T. G. Donaca

Tony Fazio

Mr. Ivan F. Phipps, one of the district's attorneys, was also present at the meeting.

The president, J. H. MacKenzie, presided, and the secretary, H. L. Boyles, kept the minutes.

The minutes of the previous meeting were read and approved.

Mr. Fazio made a motion which was seconded and unanimously passed. (Resolved that Mr. R. H. Sievert be given notice that the rent on the Buland Tract be ten dollars per acre per year, on a month to month basis.)

Mr. Phipps suggested that the secretary write a letter to Mr. Gault, advising him that there is a boat hanging on the dyke in Columbia slough, that would, in case of high water, dig in and injure the rip-rap.

It was suggested that the secretary also write the Oregon State Highway Commission and the U. S. Engineers, advising them that the underpass on Denver Avenue, at Vanport, may cause trouble in case of a flood by dividing Districts No. 1 and No. 2, and that Denver Avenue serves as a dyke

between the two Districts. The Board of Directors feel that a stop-log should be erected on this underpass.

There was considerable discussion concerning the Schmeier property, which is now under foreclosure proceedings.

We were advised by Mr. Phipps that if the district would offer a compromise, Mr. Schmeier would consider paying all back drainage taxes.

Mr. Fazio made the following motion, which was seconded and unanimously passed: (Be it resolved that for a period of ninety days from April 19, 1943, all interest and penalty on drainage taxes shall be abrogated to all taxpayers paying in full.)

It was suggested by Mr. MacKenzie that our attorney immediately take steps to close all cases we have now pending for tax foreclosure.

The resolution was passed, a copy of which is attached herewith, authorizing the First National Bank, Main Branch, Portland, Oregon, our paying agent for \$60,000.00 refunding bonds.

There was no further business to come before the meeting and it was adjourned.

/s/ H. L. BOYLES,
Secretary.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 32

United States District Court
District of Oregon
Civil No. 5190
(And Related Cases)

MEARL C. TILLMAN and EMILY P. TILL-
MAN, Husband and Wife,
Plaintiffs,
vs.
THE UNITED STATES OF AMERICA,
Defendant.

DEPOSITION OF DONOVAN C. BYERS
Taken on Behalf of Defendant, Pursuant to
Federal Rules of Civil Procedure

Be It Remembered That, pursuant to the Federal Rules of Civil Procedure and the oral stipulation hereinafter set out, the deposition of Donovan C. Byers was taken on behalf of the Defendant before Ira G. Holcomb, a Notary Public for Oregon, on the 15th day of September, 1952, beginning at 4:30 o'clock p.m., in the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon.

Appearances:

WILLIAM C. RALSTON,
Of Attorneys for Plaintiffs.

WALKER LOWRY,
Special Assistant to the Attorney General,
Appearing on Behalf of the United
States of America.

Exhibit No. 32—(Continued)
(Deposition of Donovan C. Byers.)

Stipulation

Mr. Lowry: Mr. Ralston, may we have a stipulation that all objections save to the form of the questions are reserved until the time of trial?

Mr. Ralston: Yes, it is so stipulated.

Mr. Lowry: Again, as in the case of Mr. Phipps, I do not expect to ask Mr. Byers any detailed questions as to his damages, but the United States will probably want to conduct some discovery proceedings later along that line in case it turns out to be necessary.

Mr. Ralston: Satisfactory.

DONOVAN C. BYERS

was thereupon produced as a witness on behalf of Defendant, pursuant to the Federal Rules of Civil Procedure, and, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows: [2*]

Direct Examination

By Mr. Lowry:

Q. State your full name.

A. Donovan C. Byers.

Q. What is your address, Mr. Byers?

A. 1150 Northeast Faloma Road.

Q. Portland? A. Portland 11.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

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Q. Are you an engineer?

A. I am an architect. During the Housing Authority days I had the title of engineer, through no qualifications.

Q. Have you had some training as an architect?

A. Yes.

Q. Where? A. University of Oregon.

Q. Any degree? A. No degree.

Q. Have you had some experience as an architect?

A. I was licensed as an architect in the State of Oregon in 1946 and I have practiced my profession since then, and from 19 I was employed in an architectural office.

Q. Are you one of the plaintiffs who has sued the United States on account of property damage in Peninsula Drainage District No. 2 on account of the May, 1948, flood? A. Yes. [3]

Q. Mr. Ralston is your attorney?

A. That is right.

Q. Did you, in May and June, 1948, own some property in Peninsula Drainage District No. 2?

A. I did.

Q. Where was it located?

A. Lot 5 and a portion of Lot 6 in South Shore Acres, a subdivision.

Q. Would you tell me where that is with reference to streets and roads in Peninsula Drainage District No. 2?

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A. It is near the intersection of Gertz Road and Faloma Road.

Q. That is east of Union Avenue?

A. That is right.

Q. What is the nature of this property?

A. Residential.

Q. When did you acquire it? A. 1938.

Q. Was it improved then?

A. Yes, it had a house on it.

Q. Do you recall, roughly, what you paid for the property? A. Exactly; \$2,930.

Q. Did you at any subsequent time make any improvements on it? A. Yes.

Q. About when?

A. I am sorry. I haven't any idea what date it was. As a [4] matter of fact, it was a continuous thing. I spent money improving it over the years. Every year I put some money into it.

Q. Have you any idea how much money you put into it all told?

A. Oh, I think approximately \$20,000.

Q. Most of which, I take it, was put in subsequent to 1942? A. The major portion.

Q. The improvements that you have made were in the nature of improving the house?

A. Yes.

Q. Did you have any other property in Peninsula Drainage District No. 2? A. No.

Q. Was your property in that Drainage District insured in May and June of 1948?

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A. Yes, insured, but not against the flood.

Q. What insurance company had the insurance?

A. I don't know who had it then. That was 1942?

Q. No, in 1948.

A. Let me put it this way: Ward Cook & Company were agents for whatever insurance company it was. I don't know.

Q. Ward Cook & Company is a Portland concern? A. Portland.

Q. You have not collected any claims against the insurance company on account of the 1948 flood damage? [5] A. No.

Q. I understand at one time you were employed by the Housing Authority of Portland?

A. That is right.

Q. When did that employment begin?

A. You are going to find during this whole discussion that I am very poor on dates.

Q. Just do the best you can, Mr. Byers.

A. I would say in 1942 sometime.

Q. In what capacity?

A. At that time I was assistant to the maintenance superintendent when I was hired by the Portland Housing Authority.

Q. Who was the maintenance superintendent?

A. George King.

Q. How long did you continue on that job?

A. Approximately a year.

Q. Then what happened?

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A. I was employed as maintenance engineer to take Mr. King's place when he left the Authority.

Q. Your responsibility covered what important projects of the Housing Authority?

A. Everything that the Portland Housing Authority managed.

Q. How long did you have that job?

A. Until August, 1945.

Q. Then what happened? [6]

A. I resigned.

Q. You have had no connection with the Portland Housing Authority since August of 1945?

A. No.

Q. Ever been employed by the United States?

A. Well, not directly.

Q. The reservation you have in mind is your employment with the Portland Housing Authority of Portland?

A. Yes. Are you excluding military service?

Q. Yes, I was. A. Yes.

Q. During the period you were maintenance engineer for the Housing Authority of Portland to whom did you report? A. K. E. Eckert.

Q. Do you recall when the underpass was built along Denver Avenue? A. Only slightly.

Q. Did you have anything at all to do with the construction of the underpass? A. No.

Q. Do you recall hearing any discussions about that underpass?

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A. Not at the time of the construction, no, other than neighborhood gossip.

Q. But you at least knew of its being built?

A. Yes. [7]

Q. Did you have anything to do with the construction of the ring levee around that underpass?

A. No.

Q. Were you around the Vanport area from time to time when that ring levee was being built?

A. I can't remember whether it was entirely completed or not when I started visiting the project regularly, but I believe that the levee was done at that time. I am not positive.

Q. Do you recall anything about the reconstruction work done on the ring levee in the fall of 1943?

A. The 1943 reconstruction?

Q. All I know is this, Mr. Byers: After the levee was first completed, then some additional work was done which consisted principally of putting some clay down the slope.

A. No, I don't particularly recall that.

Q. When do you recall first paying any particular attention to this ring levee?

A. In what I believe to be 1944, after the project was all occupied and it was a going thing. Then it was my responsibility to look at that levee along with the other levees.

Q. Do you recall any particular occasion on which you first paid some special attention to the ring levee?

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A. I am not positive whether I made any particular note of the condition of the levee prior to 1944 or not. I do recall that during one of the early years that I had to do with the [8] Vanport project we had a high water, 27 feet, I believe, at which time we were very much concerned about the condition of the dike. We were not worried particularly, but were looking to see that everything was as it should be. We even had to round up stop logs, such as Mr. Phipps has referred to, for one of the openings at the opposite corner of the Drainage District. That matter had fallen to Vanport's management to take care of. Whether I made any particular note of the condition of the levee at that time or not I don't know, but I do know that in what must have been 1944, I made an inspection of the top of the dike along with some of my employees, members of the Vanport staff, and found it was sloughing away back.

Q. Do you recall in what season of the year you made that inspection?

A. It might have been spring, summer or fall. I do recall that I was out there in good weather, not slushing around in the mud.

Q. Who was with you?

A. I am sorry, but I don't remember, other than that they were Vanport personnel.

Q. Do you recall what you did, Mr. Byers?

A. Discussed the condition of the dike.

Q. I mean, what inspection did you make?

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A. Well, at that time the persons who were with me and I discussed the condition of it amongst ourselves, that is all. [9]

Then I later called the U. S. Engineers.

Q. Let me find out a little more about what you discovered on your inspection. A. Okeh.

Q. Could you tell me in some detail what you found?

A. We found sections of the dike, outside edges of the dike—by “outside” I mean the side surface on both sides—had slipped, that the slopes were sloughing off.

Q. This was up at the crown?

A. Started at the crown, yes, and slid clear to the bottom.

Q. Do you recall how many such places you observed? A. No.

Q. Do you recall seeing any cracks?

A. There were a number of very large cracks in the top of the dike which extended down for a number of feet; you could see them for a number of feet, but how much further they went I couldn't say.

Q. How far down could you see?

A. Two and three feet, I should say.

Q. And about how wide?

A. I would say that some of them were as much as eight to ten inches wide at the top.

Mr. Ralston: How much?

The Witness: Eight or ten inches.

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Q. (By Mr. Lowry): Do you recall how many such cracks there [10] were?

A. I don't recall anything like how many there were, except that they were more or less continuous along the entire length of the dike and they occurred—not just one in the top but several—there were several cracks.

Q. At the time of this inspection did you go down and look at the toe of the levee on either side? Do you remember?

A. I don't remember, but I probably did. I walked all over it.

Q. Do you think you have told me everything you saw?

A. No. We saw also that the top of the levee had settled, according to my memory, I would say two feet below the height where it joined onto the higher end.

Q. Where had the settlement taken place?

A. Where the greatest bulk of the levee was, it was cracked. It was towards the end where the levee was lesser in height.

Q. Had it settled in the center at all?

A. In the middle of it, yes.

Q. Over how long an area, do you remember?

A. Well, like I say, it was greater in the center and extended in a lesser degree to each end, the full length.

Q. And the net result was the center of the levee was lower? A. That is right.

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Q. Would you think it might have been as much as two feet lower? [11]

A. Well, that was ten years ago. That is my memory, yes.

Q. Is there anything else you remember, Mr. Byers? A. I don't remember anything else.

Q. Did you report this condition to anyone at the Housing Authority?

A. As I say, I had members of the staff of Vanport with me at the time, I am sure. I do not recall any specific report. I discussed my day's work with my superior almost every night.

Q. With Mr. Eckert?

A. Mr. Eckert. I made memorandum reports to him almost daily as to what my activities had been during the day.

Q. Do you recall any such memorandum report with respect to this inspection?

A. I do not recall it, no.

Q. You do not have it now? A. No.

Q. I think you said you called the United States Army Engineers? A. That is right.

Q. Do you remember to whom you talked?

A. I don't recall, but I talked to the office of the Engineers here in Portland. I called them for technical advice on a subject in which I felt they were experts.

I was hired by the Portland Housing Authority as an engineer, as a maintenance engineer, but this particular kind [12] of work was out of my field. I was looking for expert advice.

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Q. What did you ask them to do?

A. I asked them to come on the site with me and look at it and give me their verbal opinion of what this condition was and what it was due to and perhaps what should be done about it.

Q. Did something like that happen?

A. Two members of the Corps met me on the dike—I don't know who they were. Believe me, I have tried to remember. They met me on the dike and inspected it with me.

Q. Was this shortly after your first inspection?

A. It was.

Q. It would have been a matter of days?

A. A matter of days.

Q. Do you recall seeing anything on the second trip other than what you have already told me about that you saw on your first trip?

A. I don't recall anything, no.

Q. Do you recall any conversation with these members of the Corps of Engineers?

A. Yes. I recall that they told me at that time that the dike was not even a dike in their estimate; that the slopes of it were so steep that they did not constitute a properly constructed dike; and that its composition was not properly that of a good [13] dike.

Q. Let's see. Did these men purport to know what that dike was composed of?

A. Yes, they did. They spoke with considerable knowledge of it.

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Q. Do you recall any discussion about the significance of the cracks?

A. No, no discussion with them concerning it that I recall.

Q. Have you told me everything you remember about your discussion with these representatives of the Corps of Engineers?

A. No. There is one other item: They explained to me that it was entirely out of their jurisdiction and that all they could do was advise me as to what they presently thought should be done.

Q. Did they make any explanation of why they took that position?

A. I don't remember whether they explained that or not. I might be mixed up—might be mixing it up with the fact that I think I know why. In other words, I have lived in the District and know something of the balance of responsibility between the Engineers and the District, and they might have told me then or not. I don't know.

Q. Do you recall anything else at all about the conversation with those men? A. No.

Q. What was the next development after the meeting with the [14] representatives of the Corps?

A. I took it upon myself, with my office and assistants available in the office, to have an estimate prepared of how much work would be involved in rebuilding that dike to a proper width at the bottom, with proper slopes.

Q. You said you prepared your own estimate?

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A. Yes.

Q. What did you assume to be proper slopes and a proper width?

A. To cut the levee down from its existing one and one-half to one slope to two and one-half to one slope.

Q. Did you come to this conclusion as to what constituted a proper slope on the basis of the information provided by the Corps of Engineers' representative? A. Yes.

Q. Did you have any other information about it? A. No.

Q. What you proposed, then, was a complete reconstruction of the levee?

A. No, not to tear it out and remove it and rebuild it, but to take the earth that was there and spread it out and recap it and then blanket the entire dike, both sides, after that had been done.

Q. I understand you prepared an estimate of how much that might have cost? [15]

A. That is right.

Q. Do you remember what its cost was? Was this estimate prepared in writing?

A. It was. It is in what were my files at that time. This is a wild guess, but I believe that we got an estimate of the cost of the work from Joplin & Eldon, who are earth-moving contractors here, or were at the time.

Q. I want to understand just exactly what you

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did. You say you prepared an estimate. Did you then submit it to Mr. Eckert or to someone?

A. Yes, I submitted it to Mr. Eckert.

Q. Then did he or you get in touch with Joplin & Eldon?

A. No. I had already gotten in touch with Joplin & Eldon and gotten such an estimate of what it would cost to do that work. I made a report of what I had found to Mr. Eckert.

Q. Was this made orally or in writing?

A. Probably in writing, an interoffice memorandum.

Q. Do you personally have a copy of that report? A. No, I have not.

Q. I understand you got this estimate of the cost of the work to be done. Then what happened next, as far as you were concerned?

A. I sincerely believe that I wrote a letter for Mr. Eckert's signature, to the Regional Office, Attention of Mr. Crutsinger, which I do not find in that file, requesting funds to do that [16] work.

Q. You do recall preparing such a letter?

A. That is right.

Q. Do you know whether the letter was ever sent?

A. I have reason to believe it was because shortly after that letter was sent Mr. Peirson visited Portland. I don't recall whether he contacted me or my superior, but I had very definite instructions after that that I was exceeding my authority in con-

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tacting the Engineers—I should not have brought them into the picture at all—and that that levee was okeh and a proper levee as constructed; all it needed was a little repair job. However, I never got a letter in writing back.

Q. You say Mr. Peirson visited Portland?

A. Yes, sir.

Q. Do you recall that he talked to you about the ring levee?

A. No, sir; I don't recall whether I personally was contacted by Mr. Peirson and told these things or whether he told my superior all this and it was relayed to me.

Q. You say you received some instructions about how you had exceeded your authority. From whom did you receive those instructions?

A. That is what I say I don't remember, whether he gave them to me directly or whether he came to my superiors and told them and they in turn told me that I had gone beyond my field.

Q. You are telling me you remember very distinctly somebody [17] told you that you got out of bounds, and yet you don't remember who told you?

A. That is right. I don't remember whether it was my superiors or Mr. Peirson who was there at the time.

Q. You would not have any opinion about that at all, as to who that was?

A. I am sorry, I don't. This was fourteen years ago, I guess.

Q. I understand that.

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A. Longer than that.

Q. After this conversation about your authority, did you have anything further to do with the ring levee around the Denver Avenue Underpass?

A. Yes. I was told to prepare a program of repairs.

Q. Did you prepare such a program?

A. Yes.

Q. What did that program consist of?

A. Reworking the face of the levee where it had sloughed off the worst, the outside face, the face next to No. 2, cutting it down, as described in one of these letters, cutting down the surface and repacking it in layers and then filling in the cracks on the top and building a crown over the top after bringing the top of it level.

Q. Who gave you instructions to do that?

A. Mr. Eckert, my superior.

Q. Did you prepare such a program? [18]

A. I don't know that I prepared it specifically as a program. We, in turn, had estimates prepared on such a program and wrote letters to the Regional Office requesting authority to do that work.

Q. What happened after that?

A. We were authorized to do it.

Q. Was that work actually done?

A. I believe it was.

Q. You said it was your business to inspect this levee?

A. That is right.

Q. Wouldn't your inspection trips show you whether or not that work was done?

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A. That is right. The nature of your question threw me off. I would say positively that it was done.

Q. I want to be sure that we have in mind here just what was done. A. Yes.

Q. The outside slope was reworked and the cracks were filled in?

A. The outside slope was reworked very shabbily.

Q. What do you mean by "very shabbily"?

A. To a width of perhaps four feet.

Q. You went four feet into the slope?

A. We went to the bottom where the worst slides had occurred and widened it to a width of approximately three or four feet, [19] and then worked the face up with new material, only in the areas that had sloughed off.

Q. Does that really mean you extended the levee three or four feet? Is that the effect of what you did?

A. That would be the effect in those areas where it had sloughed, yes, because we started from that sloughing at the bottom and added material to that, to bring that up to an even slope to the top.

Q. Do you know where that material you added came from? Of course, this work was done under your personal supervision?

A. Not under my direct supervision, no.

Q. Do you have any idea who supervised it directly?

A. No, only that it would have been done directly under the supervision of Oral K. Tichenor, who was

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maintenance superintendent on the project. He may have delegated it to someone.

Q. What is that name?

A. Tichenor, T-i-c-h-e-n-o-r.

Q. Is Mr. Tichenor still in this area?

A. Yes.

Q. Do you know what he does?

A. Yes. He is Manager of the Preservative Paint Company on the East Side.

Q. To get back to this work, Mr. Byers, I understand that in areas where you sloughed you added some material and reworked the face? [20]

A. That is right.

Q. What was done about the cracks?

A. We tamped them full of dirt; put dirt into them and tamped it down in and then added material across the entire top as a capping. Our purpose was to keep the water from making a water course of these cracks and thus taking dirt out of the bottom; we tried to get an impervious capping there.

Q. Do you know where that material came from?

A. No, I don't know.

Q. This work was done by the employees of the Housing Authority of Portland?

A. I believe so. I don't believe we put it out on contract.

Q. In addition to reworking the surface and fixing the cracks, was anything done to the ring levee? A. Nothing.

Q. Do you recall seeing the ring levee after that work was done?

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A. I do not specifically recall it.

Q. Do you recall ever making any report to the United States Army Engineers on the work that was done in repairing the ring levee?

A. I am sure I did not.

Q. You are sure you did not?

A. That is right.

Q. Do you recall making any report to any representatives of [21] the United States?

A. Not other than the representatives of the Federal Public Housing Authority. I made my verbal reports to them.

Q. To whom?

A. To Harold Munday. I don't know whether I would have reported to Peirson or not; probably not—but I know I would have reported to Munday.

Q. What was Mr. Munday's job at that time?

A. Mr. Munday was the assistant to the Director of the Federal Public Housing Authority in Region 9 for maintenance.

Q. Did he come to Portland from time to time?

A. Yes.

Q. Do you specifically recall talking to Mr. Munday about this ring levee? A. Yes.

Q. So, what you are saying is that, just as a routine matter, you would report it?

A. I reported to him. He made inspection trips on the project very frequently, and we always went over the work that had been done.

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Q. But you do not recall any particular conversation or report? A. Not specifically, no.

Q. Do you recall being on the ring levee at any time after you left the Housing Authority of Portland prior to when it [22] failed?

A. No, I do not.

Q. What is your opinion of the condition of the ring levee after the repair work had been done on it?

A. My opinion?

Q. Your opinion.

A. That it was hopelessly inadequate.

Q. Did you tell this to anybody?

A. I told it to Mr. Peirson.

Q. Do you recall when that conversation took place?

A. Sometime subsequent to my being told that it could only be repaired and not rebuilt.

Q. While you were still with the Housing Authority?

A. While I was still with the Housing Authority.

Q. In that conversation did you tell Mr. Peirson about the repairs that had been made?

A. May I ask a question?

Q. Surely.

A. Are you asking if I remember a specific conversation or my recollection simply of what happened?

Q. I would like you to remember, if you can, specific events.

A. I do not remember any specific conversation

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with Mr. Peirson. However, I saw him frequently, many, many times, and we discussed the problems in connection with the project almost every time I met him. [23]

Q. In these conversations you had with Mr. Peirson and Mr. Munday, of course you were, in a sense, talking with employees of the Housing Authority of Portland? A. I was.

Q. And, of course, the concern of the Housing Authority of Portland was for Vanport?

A. Yes, sir; and that was the concern that I was expressing when I was concerned about that levee.

Q. You felt it was inadequate to protect Vanport? A. That is right.

Q. Had you given any attention to whether or not it was adequate to protect Peninsula Drainage District No. 2? A. I gave that attention, too.

Q. In the attention that you gave to this levee, Mr. Byers, did you understand the principal flood danger was from water that might first come into Peninsula Drainage District No. 2 or Peninsula Drainage District No. 1?

A. I hope I am a logical man, and it has always been my impression, my understanding, that that was a levee to protect one from the other in case either of the others met with disaster, that it was for the protection of one or the other.

Q. Do you recall any discussion at all on that point with Mr. Peirson or Mr. Munday?

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A. Oh, no; I do not.

Q. The reason I asked you about that was that Mr. Phipps said [24] today—perhaps you heard him—that the principal concern at the time of the 1948 flood was water coming from the eastward and traveling westward—that is, coming first from Peninsula Drainage District No. 2. I wondered if you had any similar impression?

A. No, I had no such impression, I am sure.

Q. After these conversations with Mr. Peirson and Mr. Munday, and while you were with the Housing Authority of Portland, did you do anything else at all in connection with the Denver Avenue underpass or the ring levee?

A. No, sir; I don't recall that I did. Wait a minute. I am not sure whether it was my department or another department that ran a water line over that levee during the time I was connected with the Housing Authority, and I do recall that it was run over the levee, not through it.

Q. Do you recall anything else? A. No.

Mr. Ralston: You are referring now to the Housing Authority of Portland?

The Witness: The Housing Authority of Portland ran a water line from Vanport to East Vanport, over that levee.

Q. (By Mr. Lowry): You said you felt that the ring levee was wholly inadequate. What was the basis for that conclusion?

A. That it was constructed largely with sand;

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that it was so steep and so narrow, which was not in conformance with the [25] advice of experts, the U. S. Engineers, who were the best authority I could find on levee construction.

Q. Have you told me everything you can remember about any discussions you might have had with either Mr. Peirson or Mr. Munday about the adequacy of the ring levee? Do you remember any details of those conversations?

A. May I give you an impression I got?

Q. Surely.

A. Mr. Peirson, it was my impression, took a personal affront to my questioning the levee which he had caused to be constructed.

Q. That is an impression?

A. That is the impression that I had and that I have carried with me for years. Incidentally, I have a high regard for Mr. Peirson.

Q. Do you recall any details of the conversation with Mr. Munday? A. No.

Q. I think you said you did not report the conclusions you reached about the adequacy, or inadequacy, of the ring levee to the Army Engineers?

A. That is right. I did not.

Q. Did you report it to any representative of the United States other than Mr. Peirson and Mr. Munday? A. I did not, no. [26]

Q. Did you take this subject up at all with the supervisors of Peninsula Drainage District No. 2?

A. No.

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Q. Do you recall any discussion with anyone at all other than the people you have told me about?

A. No, I don't recall discussing it with anyone else. I might have mentioned it to neighbors, but I don't recall any discussion.

Q. Did you try to do anything about it?

A. I had done all I could do. That is the way I felt about it. When I had been told to stop that by people who paid me every month, I quit.

Q. At the time you reached your conclusion about the adequacy, or lack of it, of the ring levee, was there any reason to expect that any primary levees in either Drainage District would fail?

A. No.

Q. So your conclusion was based on an assumption that they might fail?

A. That is right, because that is the reason that levee was there.

Q. Your own opinion was that it ought to be built so as to have strength similar to the strength of the primary levees?

A. That was my opinion.

Q. And it was because, in your opinion, it was not equally [27] as strong as the primary levees you felt it was inadequate? A. That is right.

Q. Do you recall hearing or participating in any discussion about the ring levee after you left the Housing Authority of Portland and prior to the time of the flood? A. I do not recall it.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. Do you recall that you made any personal inspection of the condition of the ring levee after you left the Housing Authority of Portland and prior to the flood in 1948?

A. No, sir. May I interject something?

Q. You don't recall it?

A. No, I don't recall it.

Q. You are a member of Peninsula Drainage District No. 2, at least in the sense that you pay assessments?

A. That is right.

Q. Have you ever been an officer of that District?

A. No.

Q. Have you ever attended any meetings of the landowners of the District?

A. Annual meetings, yes. I attended a number of them.

Q. Do you recall any discussion at those meetings prior to the flood concerning the Denver Avenue underpass or the ring levee?

A. No, I don't. I don't recall any such discussions, not that such discussions did not take place but because I was [28] there for another purpose.

Q. Do you recall that you ever suggested to the other landowners in the District at those meetings that you thought the ring levee was inadequate?

A. I don't recall that I ever suggested it as any official business of the District. I am sure I must have discussed it with my neighbors.

Q. But you do not recall any such discussion at any one of these annual meetings?

A. No.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. Were you in this area, Mr. Byers, during May and June, 1948?

A. I was during those months. I was not there during the day of the flood. I was in Oakland.

Q. Oakland, California? A. Yes.

Q. When did you leave Portland in May of 1948? How long prior to the flood?

A. Let me see; two or three days; I don't recall exactly.

Q. Did you participate at all in the flood fight prior to the time you left?

A. No, at the time I left there was no flood fight going on.

Q. When did you get back?

A. The day after my house went under water, the Tuesday following Monday, which was Memorial Day. [29]

Mr. Ralston: No, Sunday was Memorial Day.

The Witness (Continuing): I came back Tuesday, if I remember my dates correctly. Anyway, it was the day following.

Q. (By Mr. Lowry): Was your wife living here at the time?

A. My wife and children were with me on my trip to Oakland. Her family was the reason for the trip.

Q. So there was no one living at your house during the flood?

A. My parents lived in a small house on the same property with me, and they were there.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. Did they leave prior to when the water came in Peninsula Drainage District No. 2?

A. They did. My father and my business partner took a walk up to the levee and took a look at the water behind it and decided it was time for them to move, and my partner, his two boys, my father and cousin moved my father and myself lock, stock and barrel the day before. We were told about it.

Q. They took everything out which was movable?

A. Nearly everything. There were some things left there.

Q. Mr. Byers, do you have in your possession any writings at all relating to the Denver Avenue underpass or the ring levee?

A. I can certainly say I do not, and I have certainly searched. As a matter of fact, I went back to my attic in the hope of finding that particular letter. I had copies of some letters that I wrote, as a member of the Portland Housing Authority staff, and I thought I might have that one—thought that I [30] might find it, and did not. I have that file and it is not in there.

Q. Mr. Byers, let me show you what appears to be a copy of a letter from E. Stanton Foster to C. H. Wick, dated June 6, 1944. Have you ever seen that letter before today?

A. I have not seen it before today.

Q. Who was Mr. Wick?

A. Mr. Wick was the Director of the Portland

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Housing Authority for development. He was in charge of the Development Division as my superior was in charge of the Management Division.

Q. I also have here what seems to be an inter-office memorandum from Wick to Freeman, dated July 8, 1944. Have you ever seen that before today?

A. No.

Q. I show you what appears to be a copy of a letter from the Housing Authority of Portland by Mr. Eckert to Mr. Crutsinger, dated September 5, 1944, carrying in the lower left-hand corner the initials "D.C.B.:J.L." Is it your recollection you prepared that letter? A. I believe I did.

Q. Then I show you what seems to be a copy of a letter from Harold R. Munday to the Housing Authority of Portland, dated September 15, 1944. Did you ever see that letter before today?

A. I think so. I believe there is even a sequel to it, authorizing an expenditure of funds. That authorizes the work [31] but not the funds.

Q. It is your recollection that the expenditure of funds was subsequently authorized?

A. Yes.

Q. And it was pursuant to that authorization that the repair work which you have already described took place? A. Yes.

Q. Do you know anything about Mr. Wick's background Is he a licensed engineer?

A. He is a licensed engineer and a college grad-

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

uate. That is, he has a degree in engineering. I beg your pardon. He hasn't, either.

Q. Mr. Byers, you heard me ask Mr. Phipps if he knew the names of any people who might know something about the condition of the ring levee after it was built and prior to the failure. Are there any such persons whose names occur to you in addition to those Mr. Phipps named?

A. Yes. It is my understanding that you have the testimony of Clinton McGill who was, during the period of the construction of Vanport, assistant to Mr. Peirson. He later became a member of my staff and is the person who helped me prepare the estimates.

Q. Anyone else?

A. I can say No, because I have checked the names of those who I thought might know, and they have denied any knowledge. [32] Then there was Mr. Griffin, who was Manager of the Vanport project at one time, and Mr. J. L. Franzen. You probably have him in your list of names.

Q. No.

A. He was Manager of the Vanport project from the time it started, in Management, up until Griffin took over as Manager. I do not know just when that transfer took place, whether Mr. Franzen or Mr. Griffin was the Manager of the project at the time this work took place.

Q. Is Mr. Franzen still in this area?

A. Mr. Franzen is City Manager at Salem. He

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

is a mining engineer. The chances are that he was there at the time.

Q. Does the name of anyone else occur to you?

A. It is possible that a man named Vic Feurstein—I can't spell that one for you; it is a German name; it is not spelled like it sounds. He was an employee of the City of Vanport, who personally directed the repairs to that dike.

Mr. Lowry: I guess that is all.

Mr. Ralston: No questions.

And Further Deponent Saith Not.

/s/ DONOVAN C. BYERS. [33]

Notary's Certificate

State of Oregon,

County of Multnomah—ss.

I, the undersigned, Ira G. Holcomb, a Notary Public for Oregon, do hereby certify that on the 15th day of September, 1952, before me as such Notary, at the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon, personally appeared at the time mentioned in the caption set out on Page 1 of the foregoing transcript Donovan C. Byers, a witness produced on behalf of the Defendant.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Mr. William C. Ralston, of Attorneys for Plaintiffs, appearing in their behalf, and Mr. Walker Lowry, Special Assistant to the Attorney General, appearing on behalf of the United States of America; and the said witness being by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and being carefully examined, in answer to all interrogatories propounded by the Special Assistant to the Attorney [34] General, testified as in the foregoing annexed deposition, Pages numbered 1 to 33, both inclusive, set forth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto and all objections and motions taken or made, and other proceedings occurring upon the taking of said deposition, were then and there taken down by me in shorthand and thereafter reduced to typewriting under my direction; and that said deposition, when fully transcribed, was submitted to the witness for examination and reading to or by him, and opportunity to the witness to make any changes in form or substance; and that said deposition has been retained by me for the purpose of sealing up and directing it to the Clerk of the above-entitled Court, as required by law.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties,

Exhibit No. 32—(Continued)
(Deposition of Donovan C. Byers.)

or a relative or employee of such attorney or counsel, or financially interested in the action.

In Witness Whereof, I have hereunto set my hand and notarial seal this 30th day of September, 1952.

[Seal] /s/ IRA G. HOLCOMB,
Notary Public for Oregon.

My commission expires Aug. 4, 1956.

[Endorsed]: Filed August 5, 1953. [35]

EXHIBIT No. 34

DEPOSITION OF FRANCIS JOHN KERNAN

Taken on Behalf of Defendant Pursuant to
Federal Rules of Civil Procedure

Be It Remembered That, pursuant to the Federal Rules of Civil Procedure and the oral stipulation hereinafter set out, the deposition of Francis John Kernan was taken on behalf of the Defendant before Ira G. Holcomb, a Notary Public for Oregon, on the 18th day of September, 1952, beginning at 1:30 o'clock p.m., in the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon.

Exhibit No. 34—(Continued)
(Deposition of Francis John Kernan.)

Appearances:

WILLIAM C. RALSTON,
Of Attorneys for Plaintiffs.

WALKER LOWRY,
Special Assistant to the Attorney General,
Appearing on Behalf of the United
States of America.

Stipulation

Mr. Lowry: Mr. Ralston, shall we stipulate that all objections save to the form of the questions are reserved until the time of trial?

Mr. Ralston: So stipulated.

FRANCIS JOHN KERNAN

produced as a witness on behalf of Defendant, pursuant to the Federal Rules of Civil Procedure, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Will you state your full name, Mr. Kernan?

A. Francis John Kernan.

Q. Where do you live?

A. I live in North Portland.

Q. What is your address there? [2*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

A. My address is Box 56, North Portland.

Q. Do you have your residence or your home somewhere around North Portland?

A. Yes, I live right there by that grocery store, in an apartment house. I have 14 apartments there on that corner.

Q. That is the corner of what?

A. It is Denver Avenue and Union Avenue and North Portland Road, right at the foot of Denver Avenue.

Q. You refer to the point at the junction of Denver Avenue and Union Avenue and North Portland Road, is that it? A. Yes.

Q. What business are you in, Mr. Kernan?

A. Well, I am in the contracting business, the grocery business, the filling station business and the apartment business. I also have a boat mooring down there, too. General contracting, however, is my business.

Q. Are you one of the persons who has filed a claim against the United States on account of the 1948 flood damage in Peninsula Drainage District No. 2? A. Yes, sir.

Q. Who is your attorney in that case, Mr. Kernan?

A. Sheppard & Phillips, and Mr. Ralston.

Q. How long have you lived in the area of Peninsula Drainage District No. 2?

A. Well, I bought 2,000 acres of land from Swift & Company in [3] 1932.

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Q. Did you go out there to live about that time?

A. I built a barn and put my office out there; moved out of an office building here in Portland and put my buildings out there in 1932.

Q. You have been there ever since?

A. Yes.

Q. Will you tell me what property you owned in May and June of 1948 in connection with Drainage District No. 2?

A. Yes; about 40 acres on Marine Drive, we call it.

Q. In between Faloma Road and Marine Drive?

A. Yes, 40 acres in there. I don't know just how I would get the thing lined up for you, but is that all right?

Q. Yes, that is all right. What else?

A. About 20 acres at Denver Avenue and Union Avenue, in District No. 1.

Q. Where are these apartments you mentioned?

A. They are in District No. 1 at the foot of Denver Avenue. Another 40 acres is where the farm is; that is over on Marine Drive on Gertz Road and Faloma Road—it sits right in there, right in front of the schoolhouse.

(Discussion off the record.)

Q. The only property you had in District No. 2 was the 40 acres along by the Faloma schoolhouse?

A. That is right. [4]

Q. When did you acquire that property?

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

A. 1932.

Q. Do you recall, roughly, what you paid for it?

A. I paid \$90 an acre, I am pretty sure.

Q. Have you made some improvements on the property, Mr. Kernan?

A. Oh, yes. I cleared it all off. There was quite heavy timber on it and I cleared it all off and leveled it around there and built all the fences down through there. Of course, I had more property in those days.

I built a barn 120 by 80 feet wide or 120 by 40 feet and then I had two sheds built on the side, and I had another barn that I built, 40 by 60.

Q. When did you put these barns on the property?

A. In 1932 I started them. It took me a year to put the buildings up.

Q. Have you improved the property to any substantial extent since 1942 and prior to 1948?

A. Yes. I built my little half-mile race track in there which cost me—oh, it probably cost me \$4,000.

(Discussion off the record.)

Q. I understand that you built the race track along about 1948?

A. It must have been built a couple of years before the flood.

Q. About 1946, then? A. Yes, I think so.

Q. About what value do you think you put into

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

that property [5] in Peninsula Drainage District No. 2 between 1932 and 1942, say, Mr. Kernan?

A. You mean clearing the land and all?

Q. Yes.

A. I spent \$60,000 down there in clearing it off, clearing the land and doing all of this improvement, and then those buildings cost me about—the barn itself must have cost me about twenty-five or thirty thousand dollars. Then I have three houses on the place.

Q. They were all put in prior to 1942?

A. Yes. Those houses rent for \$45 a month.

Q. So I guess it is fair to say that most of the improving you did was done prior to 1942?

A. Yes.

Q. Did you have insurance on any of this property that was damaged by the 1948 flood?

A. No, I didn't. I took that insurance off. I had all of that insured heavily, and I believe it was General Insurance, and we ordered a new blanket policy at that time on everything, when I was in the contracting business—under the other blanket policy we had everything covered, floods and everything, and when the new one went through Brice Mortgage, it did not have that provision.

Q. You have not collected any insurance money on account of the flood damage at all, then? [6]

A. No, and no money from the Red Cross or no money from anybody.

Q. Have you ever been an officer of Peninsula

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Drainage District No. 1 or Peninsula Drainage District No. 2? A. No, I have not.

Q. Of course, you have been a member of these Districts, these Drainage Districts, by reason of the fact that you owned land in the area?

A. That is right. Everybody that owns land is supposed to be a member of the District.

Q. Have you attended any meetings of the land-owners?

A. Oh, yes. I go up there once in a while. They have a meeting once a year and sometimes they get into a battle out there and they call another meeting.

Q. You have attended the annual meetings pretty regularly?

A. Yes. They notify us with a card, so we generally go.

Q. That is in both Drainage District No. 1 and Drainage District No. 2? A. Yes.

Q. Of course, you have paid assessments on your property in both Drainage Districts from year to year?

A. Yes. We have a little better system in Drainage District No. 1. Swift & Company and the Western Waxed Paper and all these big companies are in there, and they don't squabble as much as the little fellows. [7]

Q. Were you out in this area when the underpass was built under Denver Avenue to provide access to Vanport?

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

A. I was right along in there all the time, yes.

Q. You were there when the ring levee was being constructed around the underpass? A. Yes.

Q. Mr. Kernan, did you make any protest to anyone about building the underpass itself?

A. Well, I did say to MacKenzie, who was on the Drainage District, and I think Tom Donaca was on there, that I thought it was not very much of a protection that we were going to get by that dike they were building. I understood Fred Christensen came in there with his dump trucks and dumped dirt. It was a small dike, just room enough for him to get on top.

Of course, I am not very much of a fellow to go around beefing or hollering my head off, but I know this job that was done in there certainly was a weak sister to take care of anything.

Q. And you said something about it to Mr. MacKenzie and to Mr. Donaca?

A. I believe I told Mr. MacKenzie. I am pretty sure I told Tom Donaca, too. I am pretty sure I told Tom Donaca. I asked them, "Who gave the Government," or "Who gave them permission to cut a hole in Denver Avenue"? and what kind of a dike it was they were building down there. [8]

Q. Do you remember talking to anyone else about it? A. No, I don't.

Q. You did not, however, talk to anyone in the United States Army Engineers, for example, about it? A. No.

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Q. Or anyone with the Highway Commission?

A. No.

Q. What do you remember now, Mr. Kernan, about how that ring levee was built? Do you remember seeing it when they were first starting to build it?

A. I noticed these trucks go out there and dump sand in there. I am pretty sure that Fred Christensen hauled some dirt in there from basements, kind of a top soil or something like that, but I never paid too much attention to that, either, any more than I noticed it was about a 9-foot dike on top and had a straight up-and-down slope, about a one and one-half to one slope. It was just a little narrow dike, if you would call it a dike, because I have done quite a lot of diking myself, and I thought it was a very poor job to reinforce the property there, but I did not make any kicks to anybody. I just noticed it and didn't see any use of battling with these fellows.

Q. What I was wondering is whether or not you remembered anything about the technique by which the thing was built? For example, when trucks dumped sand in there, what would they do? Drive out on the levee and circle around it and dump the [9] sand?

A. No, sir; I understand they backed out and dumped it. I think they had some 'dozers. I didn't pay too much attention to that. I know that they just drove out and dumped it. It was not put in like you would ordinarily do it, just building it up. I

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

am pretty sure it was dumped out there by trucks, because I have seen the trucks dumping there.

Q. How was Mr. Christensen putting on this top soil, as you call it?

A. He just dumped it on top of the sand, because I know somebody else had hauled some sand in there and dumped it, and I am pretty sure Fred Christensen's trucks hauled some top soil in there and dumped it on top of this sand, so as to kind of make an apron over the fill.

Q. Did you ever go out onto the ring levee after it was built? A. No, I never did.

Q. You did not make any kind of an inspection of it at any time, any inspection of any kind?

A. No.

Q. So you don't know whether some cracks developed in it or not, do you? A. No, sir.

Q. Where were you at the time of the flood fight in 1948, Mr. Kernan?

A. I was working out on Faloma Road. You mean as the flood [10] was going into there? In fact, I was out there. I was a kind of a big shot out there; I had about 2,500 or 3,000 men out there. I was working under the Government Engineers' instructions, supervising these fellows around there, and had a bunch of trucks hauling in materials, filling up sacks, plugging up holes all around through there, and so on, and building it up so if the water came up it would not go over the top.

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Q. This was on the river front levee of Peninsula Drainage District No. 2?

A. That is right.

Q. After the failure of Vanport were you down on Denver Avenue at any time before it failed?

A. You mean as the flood came in?

Q. Yes.

A. It was on a Sunday afternoon and I had been working—we had a number of head of horses and I just rounded them up and got them out of there. I had a few horses of my own, so in the afternoon I gathered up all my family and we took a horse apiece and we took them off the place and took them up around to 33rd Street and left them up there, and then I came back down to the corner by the grocery store and when I got down there Vanport had been hit and the flood was on. I just didn't see the flood that came in from the other side.

Q. As I remember, the water came into Vanport about 4:30 Sunday afternoon? [11] A. Yes.

Q. Then I think this ring levee at Denver Avenue failed the following night?

A. That is right.

Q. In between those two times were you out on Denver Avenue at all?

A. No. I left there about 3:00 o'clock and I didn't get back from where my business was until, I would say, 6:00 or 7:00 o'clock. I came there just about the time that another hole had washed out

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

over there and the telephone line went down. I would say I got there about 7:00 o'clock.

Q. You did not see the ring levee before it broke and after the water came into Vanport?

A. No.

Q. And you did not have anything to do with the flood fight that was conducted along Denver Avenue?

A. No.

Q. Did you get news of some sort of an order for evacuation of Peninsula Drainage District No. 2 while you were out there?

A. Of course, when I came back, yes, after we had taken our horses out. I think that started in the afternoon some time.

Q. How much of your property did you move out of there before the water got into Peninsula Drainage District No. 2?

A. Well, we got some of the furniture out of the houses and put it up in the loft of the barn. I wasn't there, but [12] some of the sheriffs and someone else was moving the stuff out of the houses, what they could get out.

Q. Did you save some of it?

A. Yes; very little. At my house up on top of the hill I think they piled beds and stuff up on top of each other. We didn't lose it all. I don't know just how much.

Q. Did you try to take anything out of the Drainage District other than the horses; that is, move it out completely?

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

A. No. I think we put some stuff up in the lofts of these barns.

Q. Did you save the stuff that you had put into the lofts? A. Yes.

Q. Or did the barn get washed out, too?

A. One barn got washed out a little bit, but it didn't—the water came up to the floor of the barn and then there was a little platform up on top, so they put the stuff up there. We saved some of it.

Q. I understand you never had any discussions at all with any representatives of the Corps of Engineers about either the underpass or the ring levee before it broke? A. No.

Q. Did you have any discussions with anyone from the Housing Authority of Portland?

A. No.

Q. Or from the Federal Public Housing [13] Authority? A. No.

Q. Do you have anything in writing about the ring levee or the underpass or about the flood? Did you ever write any letters or see any letters relating to that or anything like that? Or did you ever make any reports to anybody?

A. I don't know whether I wrote out something and gave it to these fellows or not. I don't believe I did.

Mr. Ralston: He does not mean that.

Q. (By Mr. Lowry): In any event, nothing except what you might have given to your lawyer?

A. Nothing, no.

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Q. You don't have any photographs of the ring levee?

A. Yes, I have a photograph of the ring levee, afterwards.

(Discussion off the record.)

Q. Let me ask you some questions about these photographs, Mr. Kernan. After the ring levee broke in 1948, did you go out and make an inspection of it?

A. Yes, I took those pictures.

Q. Of course, most of it was washed away, wasn't it?

A. That is right.

Q. You took a look at what was left?

A. Took pictures of what was left, yes.

Q. I notice from these pictures you have handed me that there was a pretty heavy stand of grass and brush along on top and on the side? [14]

A. Yes.

Q. In the part that was left did you see any cracks up in the top of it or anything like that?

A. No, I didn't notice that. It had so much grass on it you couldn't hardly see down in there anyway.

Q. Did you notice anything that would give you any idea about why it broke?

A. Well, I will tell you. Some of the boys, the Government Engineers, said that right down at the foot of the dike, where she washed out, where the trees were, they had had some test holes down in there and they got sand, found sand, and when the water started to go in it went into that sand and

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

oozed right on through; it should have been built out of different soil.

On that marine dike they have got over there today, it is all built out of clay. It has got a good surface and is made to stand up under the Government Engineers' tests.

In this other one, the sand that is down underneath there, it just ran like water. I know down on the bottom of it there was sand.

Q. Did you see anything else?

A. Well, there were roots of trees in there, but you couldn't tell whether——

Q. Did you, at any meeting of either Peninsula Drainage District No. 1 or Peninsula Drainage District No. 2, which you attended, [15] ever hear any discussion about the Denver Avenue Underpass or the ring levee?

A. Yes, but not in the meetings; outside, after the meetings, some fellow was discussing this underpass and the flood. I attended meetings like we always do when the water was coming up in the river. The Drainage District, No. 1, called a meeting in Mr. Williams' office in the Swift yards and discussed how they were going to fix up the dike, and so forth. We talked about how things were to be taken care of and how much money the Housing Authority had and how much money we had to pay these expenses.

Q. Did you attend a meeting of people from

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Drainage District No. 2 that was held at the Red Steer Cafe a few days before the flood?

A. I didn't come to that meeting. The one I attended was just before that. I think, if I remember right, it was when Harry Freeman and four or five of the Housing Authority boys were up there; they had a meeting; they called a meeting at the Red Steer.

Mr. Lowry: That is all I can think of.

Mr. Ralston: No questions.

And Further Deponent Saith Not.

/s/ FRANCIS JOHN KERNAN. [16]

State of Oregon,
County of Multnomah—ss.

Notary's Certificate

I, the undersigned, Ira G. Holcomb, a Notary Public for Oregon, do hereby certify that on the 18th day of September, 1952, before me, as such Notary, at the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon, personally appeared at the time mentioned in the caption set out on Page 1 of the foregoing transcript Francis John Kernan, Lowry, Special Assistant to the Attorney General, a witness produced on behalf of Defendant.

Mr. William C. Ralston, of Attorneys for Plaintiffs, appearing in their behalf, and Mr. Walker

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

appearing on behalf of the United States of America; and the said witness being by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and being carefully examined, in answer to all interrogatories propounded by the Special Assistant to the Attorney [17] General, testified as in the foregoing annexed deposition, Pages numbered 1 to 16, both inclusive, set forth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto and all objections and motions taken or made, and other proceedings occurring upon the taking of said deposition, were then and there taken down by me in shorthand and thereafter reduced to typewriting under my direction; and that said deposition, when fully transcribed, was submitted to the witness for examination and reading to or by him, and opportunity to the witness to make any changes in form or substance; and that said deposition has been retained by me for the purpose of sealing up and directing it to the Clerk of the above-entitled Court, as required by law.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the action.

In Witness Whereof, I have hereunto set my

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

hand and notarial seal this 30th day of September,
1952.

[Seal] /s/ IRA G. HOLCOMB,
Notary Public for Oregon.

My Commission Expires: Aug. 4, 1956.

[Endorsed]: Filed August 5, 1953. [18]

[Title of District Court and Cause.]

EXHIBIT No. 35

DEPOSITION OF IVAN F. PHIPPS

Taken on Behalf of Defendant, Pursuant to
Federal Rules of Civil Procedure

Be It Remembered That, pursuant to the Federal Rules of Civil Procedure and the oral stipulation hereinafter set out, the deposition of Ivan F. Phipps was taken on behalf of the Defendant before Ira G. Holcomb, a Notary Public for Oregon, on the 15th day of September, 1952, beginning at 3:00 o'clock p.m., in the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon.

Appearances:

WILLIAM C. RALSTON,
Of Attorneys for Plaintiffs.

WALKER LOWRY,
Special Assistant to the Attorney General,
Appearing on Behalf of the United
States of America.

Exhibit No. 35—(Continued)
(Deposition of Ivan F. Phipps.)

Stipulation

Mr. Lowry: Mr. Ralston, may it be stipulated that all objections except as to the form of the questions are reserved until the time of trial?

Mr. Ralston: Yes, I so stipulate.

Mr. Lowry: Mr. Ralston, I do not expect to ask Mr. Phipps any detailed questions about the amount of his damages but, by failing to do so, I would not want to waive the Government's right to investigate that matter at some later time.

Mr. Ralston: Oh, no.

IVAN F. PHIPPS

produced as a witness on behalf of Defendant, pursuant to the Federal Rules of Civil Procedure, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Will you state your full name? [2*]

A. Ivan F. Phipps.

Q. Where do you live?

A. 312-B East 12th Street, Vancouver, Washington.

Q. What business are you in, Mr. Phipps?

A. I am operating a motel, principally.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Did you practice law at one time?

A. Yes, sir; I did. I have not practiced law for the past several years; that is, I have not maintained an office, except at home.

Q. You are one of the plaintiffs in litigation against the United States on account of property damage in Peninsula Drainage District No. 2 in 1948?

A. Yes.

Q. Do you represent yourself in that litigation or do you have some other lawyer?

A. No, Mr. Ralston and Mr. Crum and perhaps other attorneys represent my claims.

Q. In May and June of 1948 did you own property in Peninsula Drainage District No. 2?

A. Yes, sir; I did.

Q. In general, what sort of properties did you own?

A. My wife and I owned a warehouse property on what was then Northeast Bridgeton Road, now Northeast Marine Drive; also, a piece of property on the corner of Northeast Gertz Road and Northeast Faloma Road, which was occupied by a small nursery. [3]

I also had an interest in property which stood of record in the name of Warren Packing Company which I understand is involved as a claimant against the United States of America.

My wife and I also were stockholders in a corporation called the Northwest Properties, Incorporated, which owned property occupied by the

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Portland Meadows Motel. I think there were several other small pieces of property scattered throughout the District, but nothing on which any damage is claimed.

Q. You referred a few moments ago to the fact you operated a motel. Is this Portland Meadows Motel the one you referred to? A. Yes, sir.

Q. Can you tell me where the Portland Meadows Motel was located in June, 1948?

A. On the corner of Schmeer Road and North Denver Avenue.

Q. That would be at the southwest corner of Peninsula Drainage District No. 2?

A. That is right.

Q. Approximately how far was this motel from the Denver Avenue Underpass into Vanport?

A. I have never measured it, but I would imagine about 600 feet.

Q. Were you living at the motel in May and June of 1948? A. Yes, I was. [4]

Q. When did you acquire the Portland Meadows Motel?

A. We acquired the property in about 1939, as I recall. The motel was built in different sections. My recollection is that the first one was built about 1942 and that the larger sections were built in 1944 and 1945.

Q. Do you have any recollection of the approximate amount you paid for the property in 1939?

A. I believe it was \$4,250.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. These improvements that occurred in 1942, 1944 and 1945, about what did they cost? Do you remember?

A. They ran in excess of a hundred thousand dollars, at that time.

Q. The bulk of the improvement work was done after the ring levee around the Denver Avenue Underpass was built?

A. I think that is right.

Q. Your damage claim, I take it, relates largely to the improvements rather than to the real property itself?

A. Yes, I think I would say the bulk of it would apply to the improvements.

Q. Are you claiming damages against the United States for damages to the warehouse property on Marine Drive? A. Yes.

Q. When did you acquire that property?

A. I can't remember, but it was prior to 1940, I would say.

Q. That property was located east of both Denver Avenue and [5] Union Avenue, is that right?

A. Yes.

Q. Subsequent to the time you acquired the property in 1940, or thereabouts, did you make some improvements on it?

A. Yes; I added a small addition to the building.

Q. When did that take place, about?

A. I would say about 1942.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Have you any idea what time of the year, in 1942?

A. Not without checking my records further. I was building a group of houses on North Bridgeton Road at the time, and I commenced these houses in 1941. I would say it was in the spring of 1942 that I completed the warehouse.

Q. Do you recall, roughly, what you paid for the warehouse property in about 1940, when you acquired it?

A. I do not have any recollection at the present time of what that purchase price was. I would have to refer to my records, which I do not have here.

Q. It was several thousand dollars?

A. It was in the neighborhood of \$2,000.

Q. Do you have any idea what the improvements in 1942 or thereabouts cost?

A. Probably another \$2,000.

Q. Were there any subsequent improvements in connection with that warehouse property?

A. No. However, the claim that I have filed also refers to [6] personal property which was in the warehouse.

Q. When was that personal property put into the warehouse, do you know?

A. Probably most of it was put in after 1942. It was building material which was drawn from and used. The bulk of that property was put in there within two years before the flood.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Within two years prior to the date of the flood? A. Yes.

Q. And, hence, after the Denver Avenue Underpass was built? A. That is right.

Q. You referred to some nursery property on Gertz Road? A. Gertz Road, yes.

Q. Are you making a claim against the United States on account of damage to that property?

A. I don't know whether that was included in the complaint or not.

Q. Perhaps you can tell me something about what it is.

A. I had probably \$2,000 worth of nursery stock on that piece of property at the time the flood came, and it was destroyed, completely destroyed.

Q. Where was the nursery with reference to Union Avenue, east or west?

A. East of Union Avenue, across Gertz Road from the Columbia Country Club.

Q. Do you recall when you acquired the nursery property on [7] Gertz Road?

A. Again, I would have to give my best recollection. I would say it was about 1941.

Q. And you invested some money in the purchase of stock which you planted on that property?

A. That is right.

Q. About when did that take place?

A. It was planted there probably in 1944 or 1945.

Q. It was the same nursery stock which was

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

planted in 1944 or 1945 which was destroyed in 1948?

A. That is right.

Q. Have you any idea what that property cost, the real property?

A. I don't recall.

Q. In the neighborhood of a few hundred dollars, something of that sort, or more?

A. I believe I paid \$1,100 for the property.

Q. What about the nursery stock?

A. The nursery stock probably cost me, maybe, \$400 to \$600 in total. Actually, the cost, of course, does not represent the value at the date of the flood because it had been taken care of and had grown substantially. I had some 600 camellia plants in the nursery worth at least \$3.00 apiece, and some 50 rhododendrons of different variety and quite a number of other varieties of shrubs.

Q. You referred to the interest which you had in some property [8] standing in the name of the Warren Packing Company. Where was that property located?

A. It was located principally east of Union Avenue and occupied the central part of Peninsula Drainage District No. 2.

Q. Was it unimproved?

A. Unimproved, yes. It was farmland.

Q. Is the Warren Packing Company a corporation or partnership or what?

A. It is a corporation which held title to this property, as Trustee, for a time—Donaca and myself and Warren Packing Company.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Does your claim against the United States include a claim for damage to the property standing in the name of the Warren Packing Company?

A. That, as I understand it, is involved in a separate suit.

Mr. Ralston: Yes.

The Witness: That is a separate suit, isn't it?

Mr. Ralston: Yes.

Q. (By Mr. Lowry): Do you know about when the Warren Packing Company acquired the property in Peninsula Drainage District No. 2?

A. They acquired that in 1936.

Q. Was that property improved at some subsequent time?

A. Well, it was improved in that it was laid out into lots and streets were built through it and the property was in [9] cultivation; there were no buildings on it that we owned.

Q. When did this improvement by Warren Packing Company take place?

A. Well, it was continuous throughout the years from 1936 until the time of the flood.

Q. Do you recall, roughly, what the Warren Packing Company paid for the property in 1936?

A. It was in the neighborhood of \$35,000. Part of that was paid by the assumption of taxes which were unpaid.

Q. Do you have any idea now what the cost of the improvements which took place in subsequent years was?

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. We spent a great many thousands of dollars on those improvements, especially on the roads, and I would say the bulk of the money was spent in surveys and roads.

Q. How was that property damaged by the flood, Mr. Phipps?

A. The single, most expensive thing we did was to put in a culvert across what is called Northeast Sixth Drive, and that was completely washed out, destroyed.

The main drainage ditch that ran down through the property washed out to the point where it was several hundred feet wide, whereas before it was about a hundred feet wide, and there was just general damage to the property. It is hard to estimate the value of the damage to the property, but it cost a tremendous amount to replace it to its prior condition.

Q. Mr. Phipps, have we now talked about all the physical [10] properties that you owned or had an interest in in Peninsula Drainage District No. 2, as to which you are making a damage claim against the United States? A. I think so.

Q. Were any of these properties insured in May and June of 1948? A. Insured?

Q. Yes. A. No.

Q. Not at all? A. Not at all.

Q. So you have not received any insurance payments on account of the flood damage at all?

A. No, none.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Were you in the Portland area in May and June of 1948? A. Yes, I was.

Q. Did you participate in any way in the flood fight at that time?

A. Yes. I was out there on the ground probably at least 12 hours a day during the entire period that the flood was occurring.

Q. What were you doing, in a general way?

A. I assisted to some extent in supervising the sand-bagging operations along North Bridgeton Road, through Faloma, and in front of the Columbia Country Club and the Portland Yacht Club [11] and I watched the bad spots in the dike.

Q. Would you say you were generally familiar with conditions around Peninsula Drainage District No. 2? A. Yes.

Q. Did you have any occasion to be on Denver Avenue at any time during the high water period?

A. Yes, I was.

Q. About when?

A. Well, I was out along Denver Avenue there, I would say, every day. We lived right on Denver Avenue and I was there.

I was very much concerned about getting a block put in the highway at the opening under Union Avenue and also in the underpass which ran into Vanport where the flood broke through.

I attended a meeting that was held at the Red Steer Cafe about a week or ten days before the flood was at its height, and I remember in particular

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

that I was on the ring levee with Mr. Diblee within a half hour after the break in the Vanport dike, discussing the possibility of getting that sandbagged, and when Mr. Diblee left me he was leaving to go out to the pit where they were digging sand for the protection of the dike, and I understood he was going to sandbag that dike at that time.

Q. Let me go back a minute. You referred to some sort of a meeting at the Red Steer Cafe? [12]

A. That is right.

Q. About when did that take place?

A. It was about ten days before the break, I would say. There were a number of landowners there. Mr. Skelton was there on behalf of the Highway Commission. I do not remember who was there in behalf of the United States Engineers, but there were representatives there at the time.

Q. Can you tell me how many people, all told, were there?

A. I would say 20 or more people.

Q. Do you recall any individuals other than Mr. Skelton?

A. There were a number of the landowners of District No. 2. I could be wrong, but I think Mr. John Krieger was there. I am pretty certain H. M. Seivert attended the meeting. I think Mr. Donaca was there with me. Mr. Frank Kernan must have been there. I do not recall too many of them. I know there were a good many people there and that we were all interested in the same thing, and that was

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

what help could be had in protection against the flood.

Q. How did you happen to go to the meeting, Mr. Phipps?

A. I was notified a meeting was to be held and I was much interested in the subject matter.

Q. Who conducted the meeting?

A. I don't remember.

Q. Who called it, do you remember?

A. No, I don't know that I could say. I don't remember who [13] called it.

Q. Do you remember that any representative of the United States whom you can now recall by name was present at the meeting?

A. My recollection is that Mr. MacKenzie was there. I would not want to swear to it because, as I say, I don't remember that he was there; but he did have some representatives there at the meeting who discussed the problems.

Q. Was this meeting principally a meeting of the property owners of Peninsula Drainage District No. 2? A. Yes.

Q. Do you remember in general what took place at the meeting?

A. Oh, yes. I think the reason the meeting was called was because of the underpass problems. They wanted some action taken by the Highway Department and the Government to protect against these holes in our dikes.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. When you are referring to the underpasses, you are referring to the one at the junction of Denver Avenue and Union Avenue and the second underpass leading into Vanport?

A. That is right. I was interested in both. I have always taken the position that neither the State nor the Government had any right to cut out a hole through Union Avenue, the Union Avenue fill, because we always considered that as a secondary dike or protection.

Mr. Ralston: You mean Union Avenue? [14]

The Witness: Union Avenue, yes. The people living between Union Avenue and Denver Avenue felt very strongly that the danger was great along the Oregon Slough, and we did not want any water that came through from Oregon Slough to go through that hole and get into the section between Union Avenue and Denver Avenue.

That was one of the questions that we were working on, and the other, of course, was the general protection of the underpass into Vanport.

I do remember one thing that always stood out as a part of the meeting and that was when Mr. Skelton, after we made a demand that the Highway Department take some action to protect these underpasses, said he had been advised by Salem that he wasn't to spend a dime on them, and I suspect they wish they had.

Q. Did Mr. Skelton make any explanation of Salem's position?

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. No; there was no explanation required. He just said they were not going to spend any money on them.

Q. He did not state why? A. No.

Q. You were talking a moment ago, Mr. Phipps, about water coming into Peninsula Drainage District No. 2 from Columbia Slough. You were referring to a possible break east of Union Avenue, is that right?

A. Well, east of Union Avenue. That is Oregon Slough. [15]

Mr. Ralston: Oregon Slough is what I believe you said.

Q. (By Mr. Lowry): In any event, you were talking about the possibility of water coming in east of Union Avenue and traveling west?

A. Through this area here (referring to map). We have always considered that the weaker dike. The dike along Columbia Slough has always been considered a very strong dike and one that we did not worry about at all, and the dike along the Oregon Slough is the one that always had been watched more carefully because it is not quite as high as the one on Columbia Slough.

Q. That is the dike on the north, isn't it?

A. That is right.

Q. If water came through the northern dike into Peninsula Drainage District No. 2, then, when it reached this portion of the Drainage District west

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

of Union Avenue, it would have, one way or another, to go through Union Avenue?

A. That is right.

Q. At that time, Mr. Phipps, what was the possible way that water might have gone through Union Avenue besides an outright break that you people were concerned about?

A. There were only two ways, one at a culvert which ran through Union Avenue at a point just westerly of the Portland Speedway property; the other was in the underpass that was made to carry Denver Avenue traffic to Vancouver, the north-bound [16] traffic.

Q. That was at the junction of Denver Avenue and Union Avenue, at the northwest corner of the District?

A. That is right.

Q. In May of 1948 was that underpass open?

A. The underpass was open until, I would say, probably two days before the flood actually broke through into the District, when I was finally able to convince the officials in charge at that time—I think principally Mr. Diblee and his superiors—that that should be sandbagged, and it was sandbagged. Sandbags were put in there almost up to the Union Avenue roadway elevation.

Q. Do you know who put them in?

A. I took the responsibility of ordering the sacks for it and had them brought out, and I think the U. S. Engineers hauled some sand there. I would not want to say for sure, but I believe they did; I

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

think they hauled some and I think the District bought sand.

Q. That is, Peninsula Drainage District No. 2?

A. That is right.

Q. Who paid for the sacks?

A. Peninsula Drainage District No. 2 paid for them.

Q. After the failure of Denver Avenue, did the sandbagging along Union Avenue go out, do you remember?

A. No, that was just sitting in still water after the flood [17] came in.

Q. Where was the failure on Union Avenue?

A. The failure on Union Avenue was here at the point of this culvert that washed out the wrong way. I think they had put sheet piling in the east end of the culvert to protect it in case the river dike went out, and the water came in from District No. 1 and washed right through it.

Q. The sheet piling was on the eastern end of the culvert?

A. That is right.

Q. So it was put there in the expectation the water would come from the east, is that right?

A. Yes.

Q. And, instead, it came from the west?

A. Yes.

Q. Mr. Phipps, when you were discussing the sandbagging under Union Avenue at the underpass, were you principally concerned then with water coming from the east?

A. Well, I figured that it would work both ways;

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

in other words, there were two sections, and if one was flooded we wanted the other one saved. That was the principal reason. As I say, we thought there were some spots that would hold up—I thought they would probably have held up indefinitely, but there were a couple of spots that we considered fairly weak spots, and we watched them very carefully.

Q. At this meeting at the Red Steer Cafe do you recall any [18] specific discussion of the Denver Avenue Underpass into Vanport?

A. Yes. We were asking that they take care of both of those, and we suggested that they sandbag that underpass completely.

Q. That was never done, as I understand it?

A. It was never done. If they had spent \$10,000 sandbagging the underpass there, it probably never would have gone through.

Q. How did it come about you ordered sand and sandbags for the Union Avenue Underpass and not for the Denver Avenue Underpass?

A. Well, I don't know. As I say, after all, we did not have any particular fear of a break in the dikes around District No. 1. Of course, everybody at that time figured if any water ever did get in there that little levee would just crumble; it had no value at all. It was just sand and was very small in comparison with the dikes around both Districts and it had a four-foot crown whereas the crown on both of the other dikes was 12 feet, as I recall.

Q. The reason the Union Avenue Underpass got

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

preferred attention was because, as you say, people were concerned with the possibility of water coming from the east and moving west?

A. That is right.

Q. Was there any meeting, subsequent to that meeting in the Red Steer Cafe, which you attended and which had to do with flood problems?

A. Well, no formal meeting of any consequence except that we [19] were meeting on the dikes all the time. We had continuous discussions with Diblee and with the supervisors of the District and representatives of the Sheriff's office about various problems out there, and I was, of course, more active than anybody else particularly in trying to get them to do some work on those underpasses because I figured there was a real danger.

Q. You brought this problem to the attention of the District supervisors in addition to Mr. Diblee and others?

A. Oh, yes. And the District supervisors, of course, had the problem pretty well in mind all the time, but the District's finances were not sufficient to permit them to spend a tremendous amount of money, and they were careful of the amount of expenditures, and they wanted to be sure that the money was required before they spent it.

Q. You also say you brought the problem to the attention of the Oregon State Highway Commission?

A. Yes.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Or to the attention of Mr. Skelton, is that right?

A. Yes. I don't know who arranged for that meeting with Skelton, but Skelton was one of those who attended. I think there were other representatives of the Highway Department there, too, but I can't remember who they were. Frank Kernan would probably remember. I have a very clear recollection that Frank Kernan was there and up on his feet making demands, shall [20] I say.

Q. Did you feel that those underpasses were, to some extent at least, the responsibility of the Highway Department?

A. I understood that the Highway Department had built them. I didn't know at the time that they had been built by the Highway Department for the Federal Public Housing Authority, but I understood later that they were.

Q. At the time we are talking about, it was your impression that both the Union Avenue and Denver Avenue Underpasses had been built by the Highway Department?

A. Yes, I understood that they were.

Q. And you felt that they had some responsibility to see to it that the underpasses did not destroy the effect of Peninsula Drainage District No. 2?

A. That is right. Under the law there is no provision for bringing suit against the Highway Department. or we certainly would have enjoined

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

the Highway Department because I think they were as much at fault as the United States Engineers or the Federal Public Housing Authority.

Q. Mr. Phipps, at any time prior to the day of the failure at the Denver Avenue Underpass were you out on that ring levee? I am talking about the flood period prior to the failure.

A. Well, I don't think I was actually upon it. Just after the flood broke into Vanport I was with Diblee and we went over. I think at that time we were over at the Columbia Slough. [21] I either hunted Mr. Diblee down and took him with me or he was there and we went together, but, anyway, I went over with him and we went on the ring levee, actually walked out on it and looked at it.

Q. This was when?

A. It was on the day of the flood.

Q. May 30, 1948?

A. May 30th, I guess it was, yes. It was on Memorial Day. Before that I think probably I just passed by and looked at it; there was no particular occasion to walk on it.

Q. But on May 30th you were actually on it?

A. That is right.

Q. For the express purpose of making an inspection? A. That is right.

Q. Will you tell me in as much detail as you remember just what you saw?

A. Well, water was beginning to creep up on the underpass, and we didn't see anything different then

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

than the day before, except that water was filling Vanport. I don't think the water at that time was over four or five feet deep in the underpass.

Q. You were along the crown of the levee, as I understand it? A. Yes.

Q. Do you remember whether you walked the full length of the crown of the levee? [22]

A. I wouldn't say I walked the full length. I didn't get out to the north end of it but we walked on it from the south end and probably went out half way.

Q. Do you recall looking down the slope of the levee on either side? A. Yes.

Q. Do you remember whether or not those slopes had been seeded? Was there grass growing along them?

A. I think there was a little grass. As I recall, it never did have very much of a crop of grass, because there wasn't very much for it to grow in.

Q. Looking down these slopes, did you see any cracks or breaks in the levee at any time?

A. No, I don't remember that.

Q. Do you recall seeing any cracks or breaks in the levee along the crown?

A. I don't think so. I don't remember.

Q. You would have noticed, I presume?

A. I would have noticed anything of any size. I don't believe there were any serious cracks in the levee itself. It was more the make-up of the levee and the size of it that was dangerous.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. I understand that after the water rose in the underpass a boil developed at the very toe of the slope and water started to gush out. Had that begun at the time you were out there?

A. No. It may have begun, but there wasn't anything of that [23] kind that was noticeable. Of course, as I say, that was within a half hour after the break, or very shortly after the break, and there probably would not have been any water coming out at that time. If there was, they would have been very minor.

Q. Did you, on this inspection trip, get down along the toe of the levee on either side?

A. No.

Q. But, at least, as far as you can recall now, you did not see anything unusual or anything which directed your attention to it when you made that inspection?

A. No. The only purpose of going over there was to try to get the Engineers to sandbag the dike. I did not have any objections to the condition that the dike was in. I just figured it was no good.

Q. By "sandbagging the dike," you mean putting additional sandbags on the ring levee?

A. No; sandbagging the dike itself. I figured they should have at least two layers of sandbags on the whole surface, the inside surface of the dike.

Q. In other words, down the slope?

A. That is right.

Q. And you recall discussing that problem with

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Mr. Diblee? A. Yes, sir; I do.

Q. Do you remember what was said?

A. I thought he was going to do it. When he left, he seemed [24] to be of the notion that that should be done, and he said he was going up where they were loading sand up there, back of Kenton, and I was out there later on in the evening and I noticed nothing had been done.

Q. Did you at any time after the Vanport failure discuss this proposal of sandbagging the ring levee with anyone other than Mr. Diblee? A. No.

Q. You did not mention it to the Board of Supervisors?

A. We talked about it, yes. Of course, I told them I was going to try to get the Engineers to do that work. We did not have any facilities for handling that kind of a job.

Q. By the "supervisors," you mean Mr. MacKenzie and Mr. Donaca?

A. Yes. We would have furnished sacks or anything that was necessary, if they would just say what they wanted.

Q. Were you along Denver Avenue at any time after this inspection made by you and Mr. Diblee and prior to the actual failure on Denver Avenue?

A. Just that one time, in the evening.

Q. Where did you go then?

A. To the same places we were before; just walked out there on the ring levee.

Q. That is the second trip you are speaking of?

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

A. That is the second trip, that same evening.

Q. Who was with you then? [25]

A. I was with a man who was doing some electrical work for me, as I recall. I think that is who it was. I was with one of my workmen. I believe it was Ralph Turner.

Q. Had there been any change in conditions around the ring levee that you could see then?

A. No.

Q. Had the water begun to boil up along the toe?

A. With the dike in the condition it was at that time, it would be hard to tell. As I recall, it was along in the early evening, after it was beginning to get fairly dark.

Q. Were people working on the ring levee at that time?

A. Not that I saw. It was completely vacant.

Q. Did you go to the location along Denver Avenue where they were having some trouble with water coming through an old culvert?

A. Yes. I remember that and knew about it. That had been stopped some time before. I did know the circumstances regarding that.

Q. Did you personally see the work that was done at that culvert location?

A. I saw it after it was done. As I recall, they covered the side of the west slope on Denver Avenue with some landing nets, as I recall.

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

Q. Did you go up to the site of the Denver Avenue-Union Avenue junction to see what was being done up there? [26]

A. Not at that time, no. There was no point in it.

Q. Mr. Phipps, I gather from what you say that you felt there was an improper failure on someone's part to sandbag the ring levee.

Was there anything else that happened after the Vanport failure and before the Denver Avenue failure that you felt should have been done that was not done?

A. No. I don't think there was anything else that looked like it had any serious aspects, except that. We always felt that the dikes as a whole were sound. Of course, they were awfully wet at that time. As I say, they were all holding and they looked like they were in reasonably good shape. There wasn't anybody very comfortable about them, however.

Q. Prior to the failure of Vanport itself, had you had any reason to think that there might be a failure of the Vanport levee? A. No.

Mr. Ralston: For the record, which levee are you referring to?

Mr. Lowry: I was just wondering if Mr. Phipps had seen any reason to anticipate Vanport itself would have been flooded at any time prior to the time it actually was.

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

Mr. Ralston: Are you talking about the railroad fill?

Mr. Lowry: No, the levee around that.

A. I think I said earlier in this deposition that we had not [27] felt any serious danger would develop from the dikes around Peninsula Drainage District No. 1. As a matter of fact, I was one of the supervisors of Drainage District No. 1 at the time the dikes were rebuilt by the United States Engineers in 1941, I believe it was, and we felt that those dikes were pretty sound. That is probably one reason why we did not complain later on about this ring levee, because we didn't figure that the water was apt to come in from there.

Q. Now, Mr. Phipps, I would like to ask you a few questions about your personal association with these two Drainage Districts.

You have just said that for a time at least you were a supervisor of Peninsula Drainage District No. 1? A. Yes.

Q. Were you a property owner in Peninsula Drainage District No. 1 at one time?

A. Yes, I was.

Q. From about when to when?

A. I believe it was in 1939 that Mr. Donaca and I arranged to buy all the remaining property of the Peninsula Industrial Company in Peninsula Drainage District No. 1. I could get the exact date, but I believe it was in 1939. We purchased that property and it was of record. I think it was of record

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

in the names of myself and my wife, Donaca and his wife, and Mr. and Mrs. E. W. Peake. [28]

Q. You held that about how long?

A. We held that until 1942. We made two sales of the property. I think the actual sale finally developed as a transaction with the Federal Public Housing Authority. Our initial conversations were with the Maritime Commission, but I think before the deals were completed the Federal Housing Authority stepped in and took over the Vanport area.

Q. Were you an officer of Peninsula Drainage District No. 1? A. Yes, I was.

Q. For how long, roughly?

A. About three years.

Q. Beginning about when?

A. In 1939, beginning with the time that we purchased the property. The officials who were in at that time were officers of Swift & Company and they retired and we took over, and we continued in office there until the time that we sold out to the Government.

Q. Have you been an officer of Peninsula Drainage District No. 1 since then? A. No.

Q. Were you at one time attorney for Peninsula Drainage District No. 1, or one of its attorneys?

A. I was. I acted as attorney for Peninsula Drainage District No. 1 for a great many years. I was employed by Carey & Kerr, Attorneys, and they represented both Peninsula Drainage [29] Dis-

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

trict No. 1 and Peninsula Drainage District No. 2. I handled most of their legal matters from about 1924 until 1936.

Q. As a matter of fact, you did some law work for these Drainage Districts after 1936?

A. In 1936 I left the firm of Carey & Kerr, and then I took over again when we acquired the property.

Q. Beginning about 1939 or thereabouts?

A. I would say about 1939. I was only off a short time. I think it was in 1937 that I came back in representing Peninsula Drainage District No. 2, and in 1939, I guess it was, I came back in representing District No. 1.

Q. Have you, since then, been doing some legal work off and on?

A. I did a very small amount of work for them in—I think it was about 1946 or 1947. At that time they employed Mr. William C. McCulloch. I forget just when it was. I was down at Seaside quite a bit of the time and I just gradually dropped out.

Q. But you were the lawyer for Peninsula Drainage District No. 1 and Peninsula Drainage District No. 2 in 1942, 1943 and 1944, or a lawyer for them?

A. Yes, I would say so.

Q. Were you ever a supervisor or officer of Peninsula Drainage District No. 2?

A. No. [30]

Q. Did you ever have any connection with that Drainage District, other than as an attorney or member?

A. No; just as attorney.

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

Q. Could you tell me in general, Mr. Phipps, the purposes for which Peninsula Drainage District No. 2 made levies or levied assessments on District land-owners?

A. Yes. They levied assessments for the purpose of bringing in ditches, repairing ditches, building new ditches, repairing the dike and rebuilding the dike, and, of course, servicing of bonds and miscellaneous services.

Q. About what would those assessments come to per year? Do you have any idea?

A. They varied. I would say up until the time that we acquired property in the District the tax levies were quite high. As I remember, they ran as high as \$16 an acre for a year, and when we acquired the bulk of the property, so that we could more or less control the affairs of the District, we stopped the spending of so much money and the taxes were cut down to near the \$7 or \$8 bracket. I think in about 1942 or 1943 they finally adopted a flat fee of \$10 an acre a year, and I think we have been assessing approximately that amount each year.

Q. That would produce seven or eight hundred dollars a year? A. No.

Q. No; seven or eight thousand? [31]

A. We had about 1,300 acres in Peninsula Drainage District No. 2. It would be about \$13,000. There were special levies throughout a period of years. I remember in 1928 there was a flood threat and the District at that time—I, as attorney, prepared a

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

petition to the County Court to amend our plan for reclamation, and went through all the formalities of increasing the height of our dikes which, in the original program, were set at 28 feet. We had the height of the dikes increased to 32 feet, I believe it was, in that amendment, and I believe we increased the bond issue or put a supplemental bond issue out and spent that in rebuilding the dikes. That was at the District's expense and it ran to quite a considerable amount.

Q. Mr. Phipps, do you recall when this Denver Avenue Underpass into Vanport first came to your attention?

A. I think it was just about the time that we sold to the Federal Housing Authority, or it was immediately afterwards. The thing moved very fast.

Q. Did you take any action on behalf of either Drainage District with respect to the underpass, that you can now remember?

A. I took it up with the State Highway Department. I made objections, both orally and in writing, to the Highway Department with reference to the underpass. I maintained the Highway Department had no right to cut a hole in our dike, and I always understood that Denver Avenue was one of the dikes of the District. [32]

Q. Were you taking this position on behalf of Peninsula Drainage District No. 1?

A. I personally took it on behalf of Peninsula Drainage District No. 1, in writing a letter to Mr.

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

Baldock's attention, but the reason for that was that Mr. Boyles was instructed to take similar action in behalf of District No. 2. Whether he did or not I don't know, but I assume he did, because he was certainly instructed to do that.

Q. Instructed by whom?

A. The Board of Supervisors of Peninsula Drainage District No. 2.

Q. At a meeting that you attended?

A. Yes.

Q. What position did the Highway Commission take with respect to the Denver Avenue Underpass and your protest?

A. They wrote a letter and said Denver Avenue was not a dike and that they would not accept it as such, notwithstanding the fact that the Circuit Court here had said that it was. I argued with Mr. Devers about it and argued with Mr. Baldock about it, but I could not seem to convince them that they had to do anything about it.

Q. What were you suggesting they should do, Mr. Phipps?

A. Well, as I understood it, the only way they could cut that hole in the dike was to get authority from the Court, because that is what the law says, that if you want to amend your plan [33] of reclamation you go to the Court, and they just short-cut that, because they thought they were in a big hurry. Anyhow, they would not do it. They probably could have satisfied us by putting a satisfactory dike

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

around the ditch. I don't know if everybody would have been satisfied or not, but if they had had a dike that was equal to this other dike, I assume we would have been satisfied.

Q. You took this problem up with the Oregon State Highway Commission more or less at the time the underpass was built? A. That is right.

Q. Did you at that time take this problem up with any representative or agency of the United States?

A. I don't believe I did because, as I told you before, I understood that this work was being done by the Highway Department; I didn't understand that it was being built for the Federal Public Housing Authority and, consequently, I made my complaint to the Highway Department.

I am reasonably certain the entire problem was discussed with representatives of the U. S. Engineer's office, but, there again, they did not take any position in the matter.

Q. You say you are reasonably certain you did not discuss it then?

A. No; I did not discuss that myself with them. I don't believe I did. I can't really remember.

Q. You do not recall discussing the problem of the underpass [34] with any representative of the United States? A. No, I do not.

Q. Were any plans for the underpass itself provided to permit Drainage District No. 1 and Peninsula Drainage District No. 2?

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. Yes, I am sure they were. I think I still have a copy.

Q. Were the supervisors of these two Drainage Districts familiar with those plans and what was contemplated by the Highway Department?

A. I think so.

Q. At any time while the ring levee was under construction do you recall taking any action on behalf of Peninsula Drainage District No. 1 or Peninsula Drainage District No. 2 with respect to the ring levee?

A. No; not except in the correspondence I had with the Highway Department and in my talks with Highway Department officials.

Q. Of course, that correspondence and those talks related primarily to the underpass?

A. That is right.

Q. What I was wondering about was, once the ring levee got under way, did Peninsula Drainage District No. 1 or Peninsula Drainage District No. 2 take any position as to how it should be built or whether it was being built properly or anything of that sort, at the time the building was going on?

A. I don't remember that we did after the job was constructed. I believe we objected to the size of the dike at the time the [35] plans were submitted.

Q. I might be misinformed, but I do not believe the plans of the Oregon State Highway Commission

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

refer to the dike at all. I say that only to refresh your recollection.

A. That is probably right.

Q. What I am wondering is if you recall any specific discussion or whether any specific letter was written on behalf of either Drainage District which referred specifically to the dike or to the plans for it or anything of that kind?

A. I don't think so. I don't remember it at the moment, at least.

Q. Did you, on your own behalf, discuss with anyone the plans for or the construction of the ring levee?

A. No.

Q. Were you in the neighborhood at the time the ring levee was being built?

A. Yes.

Q. Did you see the construction work that went on there?

A. I remember where they got the fill material and I saw it coming in there, and I thought it was very poor material. As a matter of fact, it was just sand that came off a sand island over there.

Q. Did you see how the construction was being done?

A. I wouldn't say that I watched it too carefully, but I did see it being built. [36]

Q. By dump trucks?

A. Yes. It was trucked in.

Q. As I understand, the ring levee was first completed in the spring of 1943 and then some further work was done on it in the fall of 1943 which con-

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

sisted principally of placing a clay blanket on the outside? A. Yes.

Q. Did you see that work being done?

A. I probably saw it, but I don't remember whether I watched it with any detail. I think the transaction between the District and the Engineers was largely carried on with Mr. MacKenzie. However, I think Mr. Donaca might know something about it.

Q. Anyway, you, yourself, did not participate in it?

A. I was very much tied up; I was building a group of houses; I was working on that practically without stopping.

Q. At any time prior to when this ring levee was first finished and when you went out on it with Mr. Diblee on May 30, 1948, do you recall making any inspection of the ring levee yourself?

A. Not with the idea of making an inspection. I saw it; I knew what it was; I saw what it looked like.

Q. Do you recall any time during the construction of the ring levee or thereafter and prior to the flood period in 1948 any discussion you had with any of the supervisors of either Drainage [37] District about that ring levee?

A. I do not have any recollection at the present moment.

Q. Do you recall whether or not the supervisors knew about the ring levee?

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

A. Oh, they knew about the ring levee, yes.

Q. Did they know, in general, how it was built?

A. I think so. I might say this: Our supervisors—I wouldn't say all of them, but I believe one and I think two of them—felt anything the Highway Department built or anything the U. S. Engineers built was adequate. I did not always take that view myself, but that was their position, and I suppose for that reason they did not make as much of a complaint as they would have otherwise.

Q. But that is your impression, that they knew in general how it was built? A. That is right.

Q. Of course, they could tell what size it was by looking at it? A. Yes.

Q. I want to show you what seems to be a copy of an agreement between the United States of America and Peninsula Drainage District No. 2, under date of April 29, 1944. Have you seen that agreement before?

A. Yes. I am not too sure, but I think I took part in the negotiations resulting in this agreement. I don't know whether [38] I drew that or not—I think this was probably drawn in Seattle, but I am not sure.

Q. Will you read the first paragraph to yourself? Then I want to ask you some questions about it. A. Down here (indicating)?

Q. No; this part here. A. I see. Yes.

Q. I call your attention particularly to section 7:

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

“The District further agrees to provide additional services in connection with the drainage of the project and protection thereof against overflow and flood waters, upon the written request of FPHA; such services to be billed to FPHA at the actual cost thereof to the District and FPHA agrees to pay for such additional services at the cost thereof to the District.”

Do you recall any discussion or any negotiations relating to that provision?

A. No, sir; I do not. I think that was just more or less of a formal provision put in there by the attorneys for the Government.

Q. As far as you know, that does not relate to any special problem of the District?

A. No, I don't think so. I can't remember anything that FPHA ever indicated that they wanted done. I figured it was just a [39] protection in case they did want to get something done. I suppose they were thinking that maybe some day there might be a flood come from the other direction and they wanted the District to give them some protection from flood waters from the other side.

Q. That is just speculation; you don't know?

A. Yes, just speculation.

Q. Do you recall after the Vanport failure an order was made by the Governor of Oregon to evacuate Peninsula Drainage District No. 2?

A. Well, I don't know that it was actually the

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

Governor. I know that the Sheriff's office was very insistent that everybody get out of there.

Q. Did you make any effort, either in response to suggestions of the Sheriff's office or otherwise, to remove any of your property from Peninsula Drainage District No. 2?

A. Yes, we took out substantially all the personal property that was movable.

Q. When did you do that?

A. Within two days before the flood, I expect.

Q. You had done this before the Vanport failure?

A. Before and after. The bulk of the stuff was taken out after the Vanport failure and before the failure in District No. 2.

Q. Did you get out everything that it was physically possible [40] to take out, as far as your property was concerned?

A. Well, we got a very substantial part of it. There was some additional property that could have been taken out, but we just didn't have the time to get it out.

Q. How were you doing this?

A. We had, I think, two big trucks working and a crew of the boys that were working. We had one more load of stuff that should have come out of the motel, but it was about 10:00 o'clock at night and we were just too worn out to get it.

Q. In any event, you made a real effort to move what you could?

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. We took out everything that we could get.

Q. I want to be sure, Mr. Phipps, that I am right in my understanding. You personally did not have any discussion with any representative of the Army Engineers concerning either the underpass along Denver Avenue or the ring levee around it at any time prior to the conversation with Mr. Diblee which you have told me about?

A. I don't remember any conversation that I had.

Q. Do you recall having any such discussion with any representative of FPHA? A. No.

Q. Do you recall having any such discussion with any representative of the Housing Authority of Portland?

A. No. The only discussion I could have had would have been [41] with the Army Engineers. We were talking to them all the time; we knew them very well, and Donaca and I were talking to them all the time. The subject may have come up, but I don't recall any specific instance. I know that we considered it to be a very poor dike and that we made a lot of comments about it. We probably told the Engineers about it some time during that period.

Q. But you do not recall any specific discussion?

A. No, I don't.

Q. Do you recall at any time prior to the actual flood period you ever suggested to any representative of the United States that the United States

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

had any responsibility for the Denver Avenue Underpass or the ring levee around it?

A. No. I didn't understand that they had anything to do with it.

Q. Do you recall that any such suggestion was made by any representative of Peninsula Drainage District No. 2?

A. That is something I couldn't say. I don't know of any.

Q. You just don't know?

A. No. I do know this, that Mr. MacKenzie and Mr. Donaca were discussing that on behalf of District No. 2. I, as attorney, did not take any part in it.

Q. Mr. Phipps, I want to show you what appears to be a photostatic copy of the minutes of the annual meeting of the landowners of Peninsula Drainage District No. 2 for October 26, [42] 1942. I notice on the second page there is a paragraph beginning, "Considerable discussion ensued," and so on.

A. I don't know what it means, to tell you the truth about it.

Q. Do you recall being at that meeting? You are listed as being in attendance.

A. Yes. I was there. I think I attended all meetings, as far as I recall.

Q. Do you have any recollection at all of the discussion to which the paragraph I referred to relates?

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. Yes, I remember the discussion. They were discussing the question of the underpass, but I don't remember anything that sounds like this.

Q. What do you remember about what was said?

A. I know, for one thing, that they were talking about who was going to pay the taxes on that four and a half acres that was involved in that underpass area, and I know that they discussed, generally, the question of the undesirability of putting that underpass through Denver Avenue, but just what this indicates there—I don't know what it means.

Q. You do not recall any details of the discussion?

A. No, just in general, that we rather objected to the fact that this was being built.

Q. Let me show you the minutes of the meeting of the Board of Supervisors of Peninsula Drainage District No. 2 for November 30, 1942. I notice that the minutes show you in [43] attendance. Then there is a reference on this first page to the underpass.

I want to know whether you recall anything that took place at that meeting on that subject?

A. As I recall, and as it is indicated in the minutes, the discussion was with reference to putting that levee around there. I have a very clear recollection that we were demanding some protection in the form of a levee, and I guess the levee that was put in there was the final result.

I believe, however, Mr. Boyles is the one who

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

wrote the letter. Right now I don't remember whether I wrote one or not.

Q. Let me show you the minutes of the meeting of April 19, 1943, particularly the paragraph at the bottom of the first page. A. Yes.

Q. Do you recall that particular discussion?

A. No, I don't. I will say that these discussions were just general. Every time we had a meeting we talked about it. This would indicate that maybe our first discussions regarding the opening through Denver Avenue may have occurred at this time instead of at that last meeting.

Q. I think these minutes are later.

A. This is the later one, is it?

Q. I notice in the April, 1943, minutes there is a reference [44] to stop logs. Do you recall any conversation on the part of the Board of Supervisors about a stop-log structure through the Denver Avenue Underpass?

A. That was one possible solution of that thing. The reason they talked about stop logs was that the United States Engineers had set up other crossings, particularly in District No. 1. In District No. 1, I think there were two road crossings that were provided with stop logs in lieu of dikes. One would have gone across Swift Boulevard around in front of Swift & Company's plant, and the other was under the railroad. There is a road, I think, called Suttle Avenue that goes under the S. P. & S. railroad fill, and that was provided with stop logs. That

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

would have been one way to have taken care of that opening under Denver Avenue.

Q. In these discussions which took place at meetings of the Board of Supervisors of Peninsula Drainage District No. 2, with respect to the Denver Avenue Underpass, was there any suggestion that the District itself might do something in the way of providing flood protection in that area?

A. Well, it was always discussed, and I think they always felt that, since the United States Engineers had, under the Flood Control Act of 1936 or 1937, been willing to make these improvements, they should try to get the Engineers to keep it up rather than spending their own money, because that kind of work would create such a burden on the District. [45]

Q. It was at least considered?

A. Oh, yes. They always had it in mind that in case of an emergency they would have to pay the bills.

Q. Mr. Phipps, before we began your deposition I showed you some letters that appear to have been sent by you to the Oregon State Highway Commission.

A. Yes.

Q. Do you think you have, anywhere in your files, any writings at all relating to the Denver Avenue Underpass or the ring levee which we have not, one way or another, looked at today?

A. The only things that might be available—I don't know where they would be at the moment—

(Exhibit No. 35—(Continued))

(Deposition of Ivan F. Phipps.)

would be some letters that I might have written in behalf of District No. 2. On the other hand, I think my conversations were verbal with the exception of this letter that I wrote as President of Peninsula Drainage District No. 1.

Mr. Lowry: Mr. Ralston, I wonder if we could have an understanding that Mr. Phipps may look for any such correspondence that exists and, if he finds it, that photostatic copies may be made?

Mr. Ralston: Yes. I have already asked Mr. Phipps to make a further search and, if possible, produce any further writings that he may be able to locate.

Mr. Lowry: And, if he finds any such writings, the Reporter may mark them in order as exhibits beginning with [46] P-1 and we will have photostats made to be attached to the deposition.

Mr. Ralston: That is satisfactory.

The Witness: I will make an effort to find any such writings.

Mr. Lowry: I have just one other question, Mr. Phipps: We are trying to locate people who might be thoroughly familiar with the condition of this ring levee from the time it was constructed until it failed on June 1, 1948.

Do you have any suggestions about people who might know about its condition during that period?

A. Well, I imagine you have in mind anybody who would know. Frank Kernan always claims to know everything that there was to know about this

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

particular levee and I think Tom Donaca was familiar with it in general, and so was I. We were wondering why they put sand in a dike like that.

Q. Is there anyone else you can think of?

A. I don't know of anybody else. Seivert might possibly know something about it.

(Discussion off the record.)

The Witness: I don't think you will find anybody being particularly concerned with it at that time, because we always figured the dikes of District No. 1 were very sound.

Q. (By Mr. Lowry): I gather from what you have said here today that your principal grievance against the Government is that [47] you feel the Government, having removed whatever protection Denver Avenue provided by building an underpass, was then somehow obligated to provide adequate protection around the underpass?

A. I think it was a completely illegal act to have put a hole in there, in any event, without complying with the Oregon statutes, and, of course, I feel in building a protective dike around the underpass it should have been made equal to Denver Avenue, which was 150 feet through at the base and 90 feet across at the top. As I suggested before, if they had built a dike that was equal to the dike around the District we probably would have been satisfied. We certainly have a complaint coming because they did not protect it.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Did you ever see any report made by the Corps of Engineers at all of an inspection which is supposed to have been made in the fall of 1944 by the Corps? A. No.

Mr. Lowry: I think that is all the questions I have.

Mr. Ralston: I have no questions at this time. You understand, of course, I will probably want him as one of our witnesses.

Mr. Lowry: Yes. Mr. Phipps, the Reporter will write this up and give you a chance to look it over and then will you sign it?

The Witness: Yes. I will say, in the meantime, if I can [48] find anything further, I will produce it. My files have been stored down at Seaside ever since about 1945. Undoubtedly some have been lost by virtue of the fact that they have been moved so many times. The Navy pushed me out of my office twice.

And Further Deponent Saith Not.

[Seal] /s/ IVAN F. PHIPPS. [49]

Notary's Certificate

State of Oregon,

County of Multnomah—ss.

I, the undersigned, Ira G. Holcomb, a Notary Public for Oregon, do hereby certify that on the

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

15th day of September, 1952, before me as such Notary, at the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon, personally appeared at the time mentioned in the caption set out on Page 1 of the foregoing transcript Ivan F. Phipps, a witness produced on behalf of the Defendant.

Mr. William C. Ralston, of Attorneys for Plaintiffs, appearing in their behalf, and Mr. Walker Lowry, Special Assistant to the Attorney General, appearing on behalf of the United States of America; and the said witness being by me first duly sworn to testify the truth, the whole truth and nothing but [50] the truth, and being carefully examined, in answer to all interrogatories propounded by the Special Assistant to the Attorney General, testified as in the foregoing annexed deposition, Pages numbered 1 to 49, both inclusive, set forth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto and all objections and motions taken or made, and other proceedings occurring upon the taking of said deposition, were then and there taken down by me in shorthand and thereafter reduced to typewriting under my direction; and that said deposition, when fully transcribed, was submitted to the witness for examination and reading to or by him, and opportunity to the witness to make any changes in form or

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

substance; and that said deposition has been retained by me for the purpose of sealing up and directing it to the Clerk of the above-entitled Court, as required by law.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the action.

In Witness Whereof, I have hereunto set my hand and notarial seal this 4th day of August, 1952.

[Seal] /s/ IRA G. HOLCOMB,
Notary Public for Oregon.

My commission expires Aug. 4, 1956.

[Endorsed]: Filed August 5, 1953. [51]

EXHIBIT No. 66

NPP 824.02(Col R-1948)-30.12

Completion Report
1948 Columbia River Flood Fight
Peninsula Drainage District No. 2
Multnomah County, Oregon

I. General Description

A. Location

Peninsula Drainage District No. 2 is located on the left bank of the Columbia River, extending from

Exhibit No. 66—(Continued)

Mile 106.5 to Mile 108.5 above its mouth, lies in portions of Sections 2, 3, 4, 9, 10 and 11 of T. 1 N., R. 1 E., of the W.M., and Sections 33 and 34 of T. 2 N., R. 1 E., of the W.M., and is bounded as follows: on the north by the Columbia River, on the east by a portion of Columbia Slough (which was dredged through original high ground to provide sufficient material to construct levees on each bank thereof and to also provide a connection of Columbia Slough with the Columbia River); on the south by the original Columbia Slough and on the west by Denver Avenue, which is an Oregon State Highway embankment that acts as a dividing levee between Peninsula No. 1 and No. 2 Drainage Districts. (See Corps of Engineers Dwgs. No. CLW-107-3/1 to CLW-107-3/7, inclusive, and CLW-107-4/3, attached as exhibits hereto.)

B. Status of Protective Works (See Attached Exhibit)

1. Levees—

a. Front levee (Columbia River side). The front levee extends an approximate total distance of 10,400 feet easterly from U. S. Highway No. 99 (Interstate Bridge approach) along the left bank of the Columbia River to a junction with the Columbia Slough levee near the location of the Columbia Edgewater Clubhouse. This stretch of levee is comprised of three sections, described as follows: Interstate Bridge approach to Faloma, approximately

Exhibit No. 66—(Continued)

3,200 feet in length, being a sand levee with 12 foot top width, 1 on 3 landside slope, with a net levee grade ranging from 33.3 to 33.4 feet above low water datum which provides a 3-foot freeboard above the 1876 high-water profile, and a riverside slope of approximately 1 on 2 as the levee was built very close to the original river bank, (see Dwg. No. CLW-107-3/5); Faloma to Portland Yacht Club. Original levee on which a two-lane oiled roadway was built (forming 4,760 feet of Marine Drive, a Multnomah County Road, having a net grade elevation varying from 32.6 to 32.9 feet above low water elevation and being approximately 2.1 to 2.4 feet above the 1876 highwater profile; with approximate side slopes of 1 on 2 and containing therein two sections of concrete flood wall of 346 feet and 610 feet, respectively, built to elevations 32.5 and 32.6 to provide protection across low profile sections of the roadway embankment, (see Dwgs. CLW-107-3/5 & 6); Portland Yacht Club to Columbia Slough. This section of the front levee approximately 2,440 feet in length, is quite high and wide, ranging in elevation from 2 to 5 feet above the 1876 high-water profile and being of such width that many residences are built thereon. This additional size is due to the placing of a hydraulic sand fill several years ago on the original ground riverward of Marine Drive which lies adjacent and parallel to the high sand levee but is of a variable height that ranges from an approximate elevation

Exhibit No. 66—(Continued)

of 30 to 32 feet above low-water datum, (see Dwg. No. CLW-107-3/6).

b. Columbia Slough Levee. This levee, approximately 17,600 feet in length, extends from the northeasterly corner of the district along the right bank of Columbia Slough throughout the easterly and southerly sides of the district to a junction with the Denver Avenue fill at the southwesterly corner of the district. This levee was reconstructed by the Corps of Engineers in approximately 1939 to a height varying from elevation 33.7 at the northeasterly corner of the district to elevation 33.3 at Denver Avenue, a top width of 12 feet and side slopes of both 2.1 and 3.1 and combinations thereof on both the landside and riverside. (See Dwg. No. CLW-107-3/6 and CLW-107-4/3.)

c. Denver Avenue Fill. The Denver Avenue embankment, part of an Oregon State Highway, is a hydraulic sand fill, constructed for road purposes only, extending from Columbia Slough northerly a distance of approximately 5,500 linear feet to a junction at the left bank of Oregon Slough with the Union Avenue embankment, a similar State Highway. Denver Avenue is a four-lane highway of approximately 40 feet or more top width, built to a height of approximately 36 to 38 feet above M.S.L., with side slopes of approximately 1 on 1½. This highway fill was built in approximately 1913. An underpass was constructed through Denver Avenue near the Columbia Slough end by the Oregon State

Exhibit No. 66—(Continued)

Highway Department. This underpass was protected on the easterly side of the Avenue by a semi-circular earthen levee of the same height as Denver Avenue with 1 on 1½ side slopes and a 12-foot top width. This protective levee had a longitudinal crack extending along the top of its northerly portion, which was reported to have formed not long after original construction was completed.

A 60-inch diameter culvert, which originally carried seepage water from the Peninsula Drainage District No. 2 through Denver Avenue to a drainage ditch in Peninsula Drainage District No. 1 and on to a pumping plant which once pumped for both districts, was reported to have been plugged by W.P.A. construction prior to 1940. Surface investigation of the side slopes and toes of Denver Avenue embankment revealed no ends of the pipe which were apparently covered and could not be located for examination of the reported plug.

2. Tide Boxes—This drainage district contained no tide boxes.

3. Pumping Plant—A pumping plant located at the southwesterly corner of the district adjacent to Columbia Slough levee contained two pumps having the following rated capacity:

1 pump—19,400 G.P.M. at a 6-foot head

1 pump—2,400 G.P.M. at a 25-foot head

Exhibit No. 66—(Continued)

C. Area Protected

The area lying within the aforementioned boundaries consists of 1,425 acres and contained a great number of fine urban homes and businesses, a few of which are listed as follows: Portland Meadows race track and buildings, an amphitheater, auto race track, two or more auto courts, Columbia-Edgewater Golf Course, Matheny & Bacon (salvage concern), a Marine Boat Shop, Faloma Elementary School, F. J. Kernan Stock Farm (including private training track and fine farm buildings), and many other smaller businesses along Union, Denver and Vancouver Avenues which bisected the district and along Marine Drive which fronted the district by the Columbia River. Development of the district into a thickly populated urban area had been very rapid within the past ten years and much of the land formerly used for agricultural purposes had been developed into sub-divisions and business properties. From Faloma Station to the Portland Yacht Club many small homes were built close to Marine Drive and from Portland Yacht Club to the Columbia-Edgewater Golf Clubhouse there were a continuous number of expensive homes built upon the highest part of the wide levee section which had been formerly built by hydraulic dredging.

* * *

V. Status of Area Following the Flood

Property damage to buildings was very great as many one-story buildings were floated from their

Exhibit No. 66—(Continued)

foundations and carried away. Other buildings which were not moved were partially immersed resulting in the warping of siding and flooring, ruining of plaster walls and the water staining of all parts immersed. Shrubby around homes and crops were practically 100% ruined. A very few houses along Marine Drive built on high foundations or on high ground escaped flood damage. Columbia-Edgewater Club House suffered considerable damage to its basement from immersion and the golf course was totally immersed killing the grass cover. The breaks in Denver and Union Avenues caused a stoppage of all traffic to the Interstate Highway Bridge until repairs were made at a later date by means of part fills and part trestles.

VI. Recommendations and Comments

A. Columbia River Flood Fight Plan

The need of a good Flood Fight Plan for the Columbia River was made very apparent to all concerned in the recent flood fight activities. The suddenness that such a plan must be put into effect precludes any last minute planning and to be effective such a plan must be worked out in the fullest detail possible and be kept up to date by constant revisions in order that it may be most effectively used when necessary.

Listed below are certain features which are recommended for incorporation in this Plan:

Exhibit No. 66—(Continued)

1. Predetermined assignment of key personnel to flood areas who have the proper experience and background to act as area supervisors and assistants.

2. Periodic visits by such personnel to the assigned areas in order to familiarize themselves with conditions in the area and meet and know the key people of the district and community with whom they would be dealing during a possible flood fight.

3. Predetermination and assignment of sources of materials, equipment and labor for the various areas, especially for the following: Materials: sandbags, sand, gravel, rip-rap rock, cement, lumber, piling, gasoline, oil and lubricants, steel landing mats, telephone wire, mesh wire. Equipment: trucks (flatbed, dump, pickup, four-wheel-drive, etc.), cars, cranes, Diesel shovels, tractors, scoopmobiles, floating plant (such as power boats, row boats, tugs, dredges, dukws, etc.), light plants, small tools (shovels, axes, brush hooks, wrenches, etc.), pumps of various sizes and kinds, intake and discharge lines (pipe), flashlights, batteries, rubber boots, walkie-talkie radios, field phones. Labor: Predetermination of flood fight labor and foremen from adjacent business concerns such as: lumber mills, aluminum plants, stevedore unions, etc., who are generally available at such times due to closure of business activities due to high water.

4. Predetermination and assignment of field

Exhibit No. 66—(Continued)

headquarters in each area with available telephone communications.

5. Predetermined plan for station marking of the levees by signs indicating mileage from a given point for every tenth of a mile around each levee system in order to expedite correct deliveries of men, equipment and materials during a flood fight, and to also provide a quick and more accurate means of describing the location of trouble spots requiring investigation.

6. Provision and use of radio equipped cars for area supervisors and key personnel in order to expedite important messages, information and directions for the supervision of the work on which time is one of the most important elements. These same cars could be used to receive directions from the District office and to submit reports of emergency nature thereto from any location within the area.

7. Predetermined division of large flood districts into sectors with sector supervisors, their assistants and area supervisors definitely assigned and duties of each delineated.

8. Arrangements for periodic training courses for newly assigned men that are unfamiliar with the type of protective work required, methods used, and policies to be followed when cooperating with other agencies and organizations.

Exhibit No. 66—(Continued)

B. Repair and Improvement of Protective Works
on Peninsula Drainage District No. 2

1. Study and investigation of front levee from Union Avenue to the Portland Yacht Club for reconstruction of levee by widening to provide a section of greater width and stability in which the natural seepage line is well within the levee section. Investigation of same levee in regard to location and removing any sewer and water lines installed therein by property owners.

2. Construction of a two-way, all-weather roadway on the top of the entire levee system to provide access at all times for emergency repairs, inspection, etc.

3. Enforcement of regulations requiring the drainage district organization to properly maintain the levee system including removal of all brush, trees, high grass and weeds from the levee top and side slopes thereby removing such hazards to the visual inspection of seepage spots during flood periods.

4. Investigation and study as to the necessity of a cut-off trench and impervious blanket on Denver and Union Avenues to prevent a possible recurrence of failures during floods of similar height.

5. Elimination of underpass through Denver Avenue.

6. Provisions for stop-log structures in the un-

Exhibit No. 66—(Continued)

derpasses through Union Avenue. Sandbag plug was washed out during the subject flood.

/s/ KENNETH R. DIBBLEE,
Assistant Chief, Construction Branch, Operations
Division.

Maps of area filed in enclosure file.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 68

Peninsula Industrial Co., to Multnomah County:

Know All Men by These Presents that Peninsula Industrial Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Oregon, in consideration of one dollar (\$1.00) and other good and valuable considerations to it paid by Multnomah County, State of Oregon, a public corporation of the State of Oregon, has bargained and sold and by these presents does grant, bargain, sell and convey unto said Multnomah County, State of Oregon, a public corporation, its successors and assigns, all the following bounded and described real property situated in the County of Multnomah and State of Oregon.

Parcel A. A strip of land eighty (80) feet wide being forty (40) feet on each side of a center line described as follows:

Exhibit No. 68—(Continued)

Beginning at a point in the North line of the land owned by the Riverton Land Company in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, which is described in book 454 at page 354, records of deeds for Multnomah County, Oregon, which point is seven hundred sixty-five (765) feet more or less measured along the said north line from the intersection of the said north line and the east and west line between section ten (10) and section three (3), township one (1) north, range one (1) east, Willamette Meridian; thence north twenty-two degrees (22°) twenty-two minutes ($22'$) west eighteen hundred ten (1,810) feet, more or less; thence on a curve of three degrees (3°) to the left seven hundred seventeen (717) feet; thence north forty-three degrees (43°) fifty-two minutes ($52'$) west thirty-eight hundred eighty-nine feet (3,889) more or less; thence on a curve of thirteen degrees (13°) to the right five hundred thirteen (513) feet; thence north twenty-two degrees (22°) forty-eight minutes ($48'$) east one hundred seventy (170) feet, more or less, to the low-water line of the Oregon Slough; said tract of land containing thirteen and one-tenth (13.1) acres more or less.

Parcel B. A strip of land eighty (80) feet wide being twenty-one (21) feet wide westerly from and fifty-nine (59) feet wide easterly from a line described as follows:

Beginning at a point the intersection of the cen-

Exhibit No. 68—(Continued)

ter line of Derby Street extended northward with the north line of the John Rankin Donation Land Claim in section nine (9), township one (1) north, range one (1) east, Willamette Meridian; thence northward on a curve of two degrees (2°) to the right of the extension of said center line of Derby Street six hundred (600) feet; thence north twelve degrees (12°) east fifty-four hundred fifty (5,450) feet more or less to a point which is the intersection of the north line of section four (4), township one (1) north, range one (1) east, Willamette Meridian, and the center line of the above-described Parcel A. Said tract of land containing ten and eight-tenths (10.8) acres more or less.

Together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining and also all its estate, right, title and interest in and to the same.

Together with the right to construct and maintain such ditches as may be necessary to provide suitable drainage required by the placing of fills or other structures by the said Multnomah County upon the parcels of land hereby conveyed, the location, width and manner of construction of the said ditches to be subject to the approval of the grantor; also the right to place the toe of the slopes of any embankments upon the real property belonging to the grantor adjoining that described in Parcels A and B herein, and the right to waste earth upon said adjoining land wherever necessary by reason

Exhibit No. 68—(Continued)

of any fill or other structure placed by the said Multnomah County upon either of the parcels of land granted hereby; but nothing herein shall be construed to convey any interest in the land of the grantor other than in Parcels A and B as herein described.

Reserving However unto the grantor and its successors all the following property privileges, rights and easements.

(a) The right to dedicate as provided by law public highway crossings and to pay out and use private highway crossings over, under or across either or both of said parcels of land hereby conveyed;

Provided However That the cost and expense thereof shall be paid by the grantor herein or its successors, except as otherwise provided in this deed.

(b) The right to cross with railroad tracks for industrial and switch track purposes under, over or at grade either or both of the parcels of land hereby conveyed at such points and places as may be desired by the grantor or its successors;

Provided However that the grantor or its successors shall be and they are hereby limited to construct and maintain not more than four (4) such crossings at grade over each of the parcels of land hereby conveyed, and the cost and expense of installing or operating any safety devices or ap-

Exhibit No. 68—(Continued)

pliances required for any of said railroad crossings by any law of the State of Oregon or by order of any regulating body of said state shall be borne as provided by law or by the order of such regulating body.

(c) The right to construct and to maintain at the expense of the grantor or its successors one (1) crossing not to exceed one hundred (100) feet in width under and through each of said parcels of land hereby conveyed, to be used by the grantor for a deep water channel, the location of said crossings on each of said parcels of land to be designated by the grantor;

Provided However That the construction thereof shall be of a character similar to the steel bridge hereafter to be built by the grantee herein on the Union Avenue approach to the Interstate Bridge over the Columbia Slough; and Provided Further That the grantor herein or its successors shall construct said crossings in such manner as not unreasonably to interfere with the traffic over said parcels of land as a highway.

(d) The right to cross and recross said parcels of land hereby conveyed with underground pipes and conduits and with overhead or underground telephone, telegraph, electric light, power or other wire crossings, the location of each of said crossings to be determined by the grantor but the type of construction to be first-class in every detail and

Exhibit No. 68—(Continued)

plans to be filed with the said county prior to said construction and any property of the county that may be disturbed in the construction of said crossings shall be restored to the reasonable satisfaction of said county.

(e) The right to construct and maintain on any portion of the said two parcels hereby conveyed not occupied or at any time required or to be required by the roadway or roadways at any time to be constructed thereon by Multnomah County, such fills, embankments and roadways as the grantor or its successors shall determine and with the right in the said grantor, its successors or assigns to occupy and use the same which said fills, embankments and roadways may be supported in whole or in part by any fill, embankment or structure constructed or maintained on either of said parcels by Multnomah County;

Provided However, That such fills or embankments so to be constructed or maintained by the grantor or its successors shall be constructed, maintained and used in such manner as not to interfere with the convenient use or occupation of any roadway maintained or to be maintained by Multnomah County or the public on either of said parcels of land hereby conveyed and so much of said fills or embankments as shall lie within Parcels A or B, shall be vacated by said grantor, its successors or assigns wholly or partly as may be required by said grantee, its successors or assigns, for highway pur-

Exhibit No. 68—(Continued)

poses without compensation for said improvements; and

Provided Further That the grantor or its successors so constructed or maintaining such embankment, fill or roadway shall make due provision for all drainage required by reason of the construction or maintenance by the grantor or its successors of such fill, embankment or roadway.

To Have and to Hold the above-described and granted premises subject to the reservations herein enumerated unto the said Multnomah County, State of Oregon, a public corporation, its successors and assigns forever;

Provided However and this conveyance is made upon the following express conditions which are hereby declared and agreed to be conditions subsequent.

(a) That the said Multnomah County shall within three (3) years from the date of this conveyance construct or cause to be constructed and thereafter maintained upon that part of the tract of land herein described as Parcel B, which is north of the north bank of Columbia Slough, a fill and embankment which shall as far as possible duplicate the fill and embankment to be constructed by said Multnomah County upon Parcel A as described herein, the west side line of the crown of said fill or embankment to coincide substantially with the west side line of said Parcel B, and shall, within said period, provide and thereafter maintain

Exhibit No. 68—(Continued)

a public highway over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereover and if sufficient funds shall be available out of the proceeds of the so-called interstate bridge bonds of Multnomah County to pave said highway in substantially the same manner as the highway to be constructed over the said Parcel A herein described, shall be paved then and within said period above prescribed said Multnomah County shall likewise pave the said highway to be constructed over the said Parcel B as herein described, which pavement shall thereafter be maintained in the manner provided by law.

(b) That the said Multnomah County shall construct of earth or other material approaches at a three per cent (3%) grade at two (2) different points leading over and across any highway, fill or structure placed upon each of the parcels hereby conveyed the location of said crossings to be designated by the grantor herein.

(c) That no toll shall ever be collected by the said Multnomah County for any travel over any highway constructed over Parcel B as herein described; Provided that this clause shall not be construed as a limitation on the right of the grantee or its successors to impose a license tax on public carriers or to impose a franchise or other tax on public carriers.

And the said Peninsula Industrial Company, a corporation, grantor above named, does covenant to

Exhibit No. 68—(Continued)

and with the county of Multnomah, State of Oregon, a public corporation, the above-named grantee, that it is lawfully seized in fee simple of the above-granted premises, that they are free from all incumbrances and that it will and its successors shall warrant and forever defend the above-granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever, subject to the reservations herein contained and the conditions subsequent herein enumerated to be kept and performed by the said grantee.

In Witness Whereof Peninsula Industrial Company, a corporation, pursuant to a resolution of its board of directors, duly adopted, has caused the within instrument to be executed by its officers thereunto duly authorized and its corporate seal to be affixed this 16th day of March, 1915.

PENINSULA INDUSTRIAL
COMPANY,

By C. C. COLT,
President.

Attest:

W. W. DOWNES,
Secretary.

Signed, sealed, and delivered in the presence of us as witnesses.

OMAR C. SPENCER,
H. E. KIZER.

(Corporate Seal)

Exhibit No. 68—(Continued)

State of Oregon,
County of Multnomah—ss.

On this 16th day of March, 1915, before me appeared C. C. Colt, to me personally known, who, being duly sworn, did say that he is the president of the Peninsula Industrial Company, the corporation that executed the within and foregoing instrument and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors and said C. C. Colt acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate, written.

[Seal]

OMAR C. SPENCER,

Notary Public for Oregon.

10 one dollar Doc U. S. Int. Rev. stamps (canceled).

Rec. for record Mar. 31, 1915, at 4:52 p.m.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 69

Peninsula Industrial Co., With Multnomah County

Know All Men by These Presents that Whereas Peninsula Industrial Company, a corporation, hereinafter called the "Company" by deed dated March 16, 1915, and recorded in book 687 at page 39, records of deeds for Multnomah County, Oregon, intended to convey certain parcels of land to Multnomah County, a public corporation of the state of Oregon, hereinafter called the "County," together with certain easements, rights and privileges therein described all for highway purposes, but reserved unto the grantor therein named certain property privileges, rights, and easements, such conveyance being also subject to certain express conditions therein set out; and

Whereas it was the intention of the parties that the county was to construct certain fills and highways upon said parcels, but from actual surveys on the ground the parties have agreed that said fills and highways as constructed are located partly on and partly off said parcels so conveyed; and

Whereas the parties have agreed that a correction deed shall be executed in order that said fills and highways may be located upon land covered by said conveyance and in order that said county will have no interest in land not used or intended to be used for said highways, and in order to carry out the true intent of the parties.

Exhibit No. 69—(Continued)

Now Therefore, Peninsula Industrial Company, a corporation, in consideration of one dollar (\$1.00) and other good and valuable considerations to it paid by Multnomah County, a public corporation of the state of Oregon, does hereby grant, bargain, sell and convey unto said Multnomah County, its successors and assigns, the following bounded and described parcels of real property situated in the county of Multnomah and state of Oregon, to wit;

Parcel A. A strip of land eighty (80) feet in width being forty (40) feet on each side of a center line described as follows;

Beginning at the intersection of the center lines of Union Avenue and Columbia Boulevard, thence running north $0^{\circ} 14'$ east 29.2 feet along the center line of Union Avenue, thence through an $8^{\circ} 00'$ curve to the left 278.8 feet, thence running north $22^{\circ} 04'$ west tangent to said curve 3,552.1 feet which is the point of beginning of the center line to be described:

Beginning at the point last mentioned which is also described as being the north line of the Lewis Love seventy-one acre tract as described in book I at page 45, deed records of Multnomah County, at a distance of 906.67 feet westerly from the northeast corner of said tract, thence running north $22^{\circ} 04'$ west 1,414.24 feet; thence through a $3^{\circ} 00'$ curve to the left 725.5 feet; thence running north $43^{\circ} 50'$ west tangent to said curve 4,273.2 feet; thence through a $13^{\circ} 00'$ curve to the right 413.0 feet to the north line of section 4, township 1 north, range

Exhibit No. 69—(Continued)

1 E., W.M., Oregon, which point is also 72.2 feet west of the northeast corner of said section, thence continuing along said $13^{\circ} 00'$ curve 99.8 feet, thence running north $22^{\circ} 50'$ east 170.0 feet, to the low-water line of North Portland Harbor, containing 12.98 acres;

Parcel B. A strip of land eighty (80) feet wide being twenty-one (21) feet westerly and fifty-nine (59) feet easterly from a center line described as follows:

Beginning at a point on the north line of section 4, township 1 north, range 1 east, of Willamette Meridian, Oregon, which point is also 72.2 feet west of the northeast corner of said section, thence running south $11^{\circ} 42'$ west 5,393.5 feet, containing 7.31 acres;

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

The parties to this instrument hereby agree that the parcels of land above-described were intended to be conveyed in the deed first herein above mentioned and the description of said parcels are hereby accepted by the parties as correct descriptions and are in lieu of the descriptions used in the deed first above mentioned, and in consideration of this conveyance Multnomah County, a public corporation of the state of Oregon, does hereby grant, bargain, sell and convey unto Peninsula Industrial Company, a corporation, its successors and assigns, all its right,

Exhibit No. 69—(Continued)

title or interest in or to any of the real property described as Parcels A and B in the said deed dated March 16, 1915, and above referred to, except so much of said parcels as is included in the corrected description of said Parcels A and B set out in the present conveyance.

It is understood between the parties hereto that except for the correction of the descriptions of Parcels A and B, all other terms, provisions, covenants, conditions, or agreements contained in the said deed between the parties hereto dated March 16, 1915, shall continue and be in full force and effect and shall have equal application to the new description of Parcels A and B herein contained and shall have the same force and effect as though set out in full in this instrument.

In Witness Whereof Peninsula Industrial Company, pursuant to a resolution of its board of directors, has caused this instrument to be executed by its officers and its corporate seal affixed, and Multnomah County, pursuant to a resolution of its board of county commissioners, has caused this instrument to be executed and its seal affixed this 31st day of December, 1926.

[Seal]

PENINSULA INDUSTRIAL
COMPANY.By B. C. DARNALL,
President.By F. R. DEUELL,
Secretary.

Exhibit No. 69—(Continued)

Witnesses:

E. A. TERRILL,
L. W. McDONNELL.

[Seal] MULTNOMAH COUNTY.

By AMEDEE M. SMITH,
CLAY S. MORSE,
GRANT PHEGLEY,
Commissioners.

Witnesses:

ORPHA R. POOR,
ANN MENSEN.

Approved as to form:

GEO. MOWREY,
Deputy District Attorney.

State of Oregon,
County of Multnomah—ss.

On this 31st day of December, 1926, before me appeared B. C. Darnall and F. R. Deuell, to me personally known who being duly sworn, did each for himself say that he, the said B. C. Darnall is the president, and he, the said F. R. Deuell, is the secretary of Peninsula Industrial Company, the corporation that executed the within instrument and that the seal affixed to said instrument is the cor-

Exhibit No. 69—(Continued)

porate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said B. C. Darnall and F. R. Deuell acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate written.

[Seal]

F. L. WEBSTER,

Notary Public for Oregon.

State of Oregon,
County of Multnomah—ss.

On this 12th day of December, 1926, before me appeared Amedee M. Smith, Clay S. Morse and Grant Phegley, to me personally known, who being duly sworn did each for himself say that he is one of the Commissioners of Multnomah County, the corporation that executed the within instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of commissioners, and said Amedee M. Smith, Clay S. Morse, and Grant Phegley acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof I have hereunto set my

Exhibit No. 69—(Continued)

hand and affixed my official seal this the day and year first in this, my certificate written.

[Seal] ORPHA R. POOR,
Notary Public for Oregon.

My commission expires Sept. 3, 1930.

Rec. for record Jan. 13, 1927, at 3:08 p.m.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 78

In the District Court of the United States in and
for the District of Oregon

UNITED STATES OF AMERICA,

Petitioner for Condemnation,

vs.

CERTAIN PARCELS OF LAND in Multnomah
County, Oregon, and the Peninsula Public Golf
Course, Inc., et al.

DECLARATION OF TAKING

* * *

[Declaration of Taking concerning the taking of
136.11 acres bounded by Denver Avenue on the east
—Subdivision No. 3 which reads as follows:]

3. The estate taken for said public use is the full
fee simple title in and to said lands, together with

all improvements thereon and any leaseholds and other interests therein; subject, however to (1) Slope easements, if any, in favor of Multnomah County in connection with the Denver Avenue Approach to the Interstate Bridge; (2) the easements existing in favor of the Peninsula Drainage District No. 2; and (3) an easement or right of way in favor of the Portland General Electric Company, for the purpose of constructing and maintaining power lines and poles in and across the site.

* * *

[Endorsed]: Filed January 7, 1944.

United States District Court for the
District of Oregon
Civil 5190

MEARL C. TILLMAN and EMILY P. TILLMAN,
Husband and Wife,
vs.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

1949

Dec. 15—Filed complaint.

Dec. 15—Issued summons—to marshal.

1950

Jan. 3—Filed summons with marshal's return.

Jan. 18—Filed def's motion to dismiss.

1951

Nov. 23—Filed answer of deft. U. S.

1952

Oct. 31—Filed depositions of K. C. Todd, D. C. Byers & F. J. Kernan on behalf of deft.

1953

Apr. 27—Pre-trial conference.

June 8—Pre-trial conference, order setting tentatively for July 30.

Aug. 4—Filed & entered pre-trial order.

Aug. 4—Record of trial.

Aug. 5—Record of trial, order entered allowing plffs. to Sept. 15, deft. to Oct. 15 & plffs. to Oct. 25 for briefs.

Aug. 5—Filed exhibits 1 to 56, 58 to 65h, 65j to uu, 66 to 69, 72 to 74, 76 to 78 incl.

Aug. 11—Filed stipulation for withdrawal of exhibits.

Aug. 11—Filed & entered order permitting withdrawal of exhibits 1 thru 78.

Sept. 15—Filed plaintiffs' brief.

Oct. 12—Filed brief in this and related cases.

Oct. 26—Filed reply brief in this and related cases.

1954

Feb. 11—Filed transcript of proceedings of Aug. 4 & 5, 1953.

Feb. 23—Record of opinion.

Apr. 5—Record of submission of proposed findings, conclusions & judgment, entered order setting for hearing April 12, 1954.

- Apr. 15—Filed plaintiffs' objections to proposed findings of fact & conclusions of law.
- Sept. 7—Entered order setting for hearing on findings, etc., for Sept. 9, 1954.
- Sept. 8—Filed objections to defendant's proposed additional findings.
- Sept. 9—Record of hearing on proposed findings & objections thereto.
- Sept. 14—Filed and entered findings of fact and conclusions of law.
- Sept. 14—Filed and entered judgment.
- Nov. 9—Filed notice of appeal by plaintiff in this and related cases.
- Nov. 9—Filed bond for costs on appeal in this and related cases.
- Nov. 9—Filed stipulation re forwarding original file and exhibits to C of A.
- Nov. 9—Filed & entered order to forward exhibits to Court of Appeals.
- Nov. 10—Filed designation of record on appeal.

In the United States District Court for the
District of Oregon

United States of America,
District of Oregon—ss.

CERTIFICATE OF CLERK

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby

certify that the foregoing documents consisting of Complaint; Answer of the United States; Pre-trial order; Findings of fact and conclusions of law; Judgment; Notice of appeal; Bond for costs on appeal; Stipulation re forwarding exhibits, etc., to Court of Appeals; Order to forward exhibits, etc., to Court of Appeals; Designation of record; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5190, Mearl C. Tillman and Emily P. Tillman, husband and wife, vs. United States of America (and Related Cases) are appellants and plaintiffs and United States of America is the appellee and defendant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is \$5.00, and that the same has been paid by the appellants.

I further certify that there is also enclosed the Transcript of Proceedings of August 4 and 5, 1953; Opinion of Chief Judge James Alger Fee (not filed) and proposed findings of fact and conclusions of law (not filed), and

I further certify that there is being forwarded under cover exhibits 1 to 56; 58 to 64; 65-a to 65-h; 65-j to 65-z; 65-aa to 65-mm; 65-oo to 65-uu; 66; 67-a to 67-k; 68; 69; 72 to 74; and 76 to 78.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District this 3rd day of December, 1954.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14590. United States Court of Appeals for the Ninth Circuit. Mearl C. Tillman and Emily P. Tillman, husband and wife, Appellants, vs. United States of America, Appellee. (And Related Cases.) Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 4, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14590
(And Related Cases)

MEARL C. TILLMAN and EMILY P. TILLMAN,
Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

POINTS ON WHICH APPELLANTS INTEND
TO RELY

In accordance with subdivision 6 of Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, the appellants submit this statement of the points on which they intend to rely on their appeal:

I.

The Court erred in paragraph I of the Findings of Fact in adopting the “Findings of Fact in the opinion of the Court.” The Findings of Fact seem to incorporate the Findings of Fact specified in the Court’s opinion. Therefore, pointing out the errors in the opinion would seem to be merely a duplication of pointing out the errors in the Findings. Substantially all of the Findings in the opinion, as well as the Findings of Fact, appear to be all either without the issues between the parties or contradictory to the Pre-trial Order and the evidence.

Therefore, pointing out the errors in the Findings of Fact as well as in the Conclusions of Law (the Conclusions of Law in the opinion are also adopted as part of the Conclusions of Law) will probably be a sufficient designation of points to be raised by the appellants to indicate to the appellee that it is contended by the appellants that all Findings of Fact and Conclusions of Law which are not favorable to the appellant are either without the issues of the case nor supported by the evidence or are directly contradictory thereto.

II.

The Court erred in its Finding No. III of the Findings of Fact in that portion thereof which reads as follows:

“District No. 2, in which plaintiffs owned property, adopted these works (which primarily protected District No. 1) as protection for District No. 2 from the west. On the north, south, and east District No. 2 built dikes which connected with the works of District No. 1, thus accomplishing a complete circumvolution of both districts. None of these fills, dikes and levees was owned or controlled by the United States.”

III.

The Court erred in Finding No. IV of said Findings of Fact as to the following portions thereof:

“For the convenience of persons living in both districts an underpass through the Denver Avenue fill was built with federal funds. * * * No protest

against construction of the underpass was made by District No. 2. A resolution mildly suggesting objections to the construction of the underpass without a stop-log structure was passed by its board of directors, but it seems never to have been called to the attention of anyone outside that group."

IV.

The Court erred in Finding No. 5 of said Findings of Fact as to that portion thereof which reads:

"Upon protest of District No. 1, a ring levee was built, on land condemned by the United States, at the opening of the underpass upon the upriver side and in District No. 2. * * * As a matter of actual fact the ring levee also afforded some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when on May 30, 1948, the western embankment of District No. 1 failed."

V.

The Court erred in its Finding No. 7 of said Findings of Fact as to the following portions thereof:

"The failure of the western embankment at District No. 1 was the sole cause of damage to plaintiffs. That embankment, a fill designed to carry railroads and owned and controlled by the railroad companies, had been adopted by both Districts Nos. 1 and 2 as one of the flood protective works. * * *"

VI.

The Court erred in Finding No. 8 of said Findings of Fact as follows:

“Denver Avenue, the boundary between the two districts, was not intended to be a levee and was not designed as a water-repellent wall or structure. The Plan for Reclamation of District No. 2 specifically stated that no reliance was placed on Denver Avenue, and Denver Avenue is mentioned only casually as furnishing additional protection. Neither District No. 1 nor District No. 2 ever spent time or money in attempting to strengthen Denver Avenue. * * * Neither Multnomah County, the State of Oregon, the United States nor anyone else has or had any obligation to maintain Denver Avenue as a levee or for flood protection purposes.”

VII.

The Court erred in Finding No. 9 of said Findings of Fact as follows:

“In the exercise of due care, there was no reason to anticipate a failure of the western embankment or any embankment of District No. 1, and hence no reason to anticipate that flood waters would ever approach Denver Avenue and the ring levee from the west. No one contemplated Denver Avenue as a bulwark against a weight of water such as was cast against it when the western embankment at District No. 1 broke. The failure of the ring levee and the inundation of the plaintiffs’ property resulted from a set of circumstances unforeseen by anyone, including plaintiffs, and which in the exercise of due care could not have been foreseen.”

VIII.

The Court erred in Finding No. 10 of said Find-

ings of Fact in making the following Finding recited therein:

“District No. 2 at no time contributed to the construction or maintenance of Denver Avenue, and during the entire period of approximately six years between the time when the Denver Avenue underpass and ring levee were constructed and the time of the 1948 flood, District No. 2 did nothing with respect to Denver Avenue, the underpass or the ring levee. District No. 2 and not the United States had the duty of providing flood protection for lands within the District. District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands. The construction of the underpass and the failure to provide an unbreakable ring levee was not the cause, proximate or otherwise, of any damage to plaintiffs.”

IX.

The Court erred in making Finding No. 12 in its entirety.

X.

The Court erred in its Finding No. 13 in its entirety.

XI.

The Court erred in its Finding No. 14 in its entirety.

XII.

The Court erred in its Finding No. 15 in its entirety.

XIII.

The Court erred in its Finding No. 16 in its entirety.

Conclusions of Law

XIV.

The Court erred in its Conclusion No. 1 in adopting the Conclusions of Law set forth in the opinion of the Court.

XV.

The Court erred in its Conclusion of Law No. 5 in its entirety.

XVI.

The Court erred in its Conclusion of Law No. 6 in its entirety.

XVII.

The Court erred in its Conclusion of Law No. 7 in its entirety.

XVIII.

The Court erred in its Conclusion of Law No. 8 in its entirety.

XIX.

The Court erred in its Conclusion of Law No. 9 in its entirety.

XX.

The Court erred in its concluding paragraph of said Conclusions of Law, as follows:

“These Findings of fact and conclusions of law are in accordance with the pre-trial order, the record made on the trial of the actions and the opin-

ion of the Court heretofore filed in these consolidated cases.”

XXI.

The Court erred in failing to find that District No. 2 depended upon Denver Avenue Fill, formerly known as Derby Street, as flood protection from the west; that it had been constructed by the County of Multnomah and improved by the State Highway Commission under a contract, for valuable consideration, whereby the property owners in District No. 2 were given an easement to use such fill for flood protection purposes. That said fill and its utility as flood protection was deliberately, wrongfully, negligently and without legal authority destroyed by the construction of an underpass through such fill by the Federal Public Housing Authority acting as agent for the United States of America.

XXII.

That the Court erred in failing to find that the said United States of America and Federal Public Housing Authority wrongfully, negligently and deliberately failed to protect District No. 2 and the properties of the plaintiffs by an adequate ring levee surrounding such underpass for protection from waters approaching from the west, and by such acts completely destroyed the protection of the property owners in District No. 2 which they had and were entitled to retain from the said Denver Avenue Fill.

XXIII.

That the Court erred in failing to find that the said Denver Avenue Fill was complete and adequate

protection against the inundation of the lands in District No. 2 prior to the construction of such underpass and the failure to adequately protect the same.

XXIV.

The Court erred in finding for the defendant and failing to find for the plaintiffs.

/s/ VIRGIL CRUM,
Of Attorneys for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 15, 1954.

In the United States Court of Appeals,
for the Ninth Circuit
No. 14,590
(And Related Cases)
MEARL C. TILLMAN and EMILY P. TILLMAN,
Husband and Wife,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee,

STIPULATION

It Is Hereby Stipulated by and between counsel for the appellants and the appellee in the above-entitled cause and the following related and consolidated cases, to wit, Nos. 4857, 4865, 4806, 4858, 4860, 4859, 4686, 4861, 4687, 4688, 4862, 4796, 4797, 5331,

4863, 5556, 4689, 4690, 4864, 4987, 5557, 5645, 4568, 4798, 4799, 4807, 5315, 4691, 4800, 4808, 4693, 4692, 4694, 4685, 4866, 4867, 5459, 4695, 4868, 4869, 4870, 4696, 4801, 4871, 4802, 5603, 4809, 4872, 4803, 5549, and 5633, as follows:

Whereas, the above cause and all of the related cases were consolidated by stipulation in the Pre-trial Order and tried as to the liability of the United States of America for damages resulting to the appellants for flood damage, the amount of the damage to be determined later in the event the judgment be for the appellants; and

Whereas, the complaint in the above-entitled key case is typical of all complaints and it was further stipulated in the Pre-trial Order that the issues were set forth in the Pre-trial Order and as a result all question of the issues, fact and law are identical in each and all of the cases; and

Whereas, a multitude of exhibits were introduced at the trial which are not considered as having any bearing upon the issues to be raised in the United States Court of Appeals, and likewise a considerable portion of the Pre-trial Order is not considered by the appellants as having any bearing upon the issues:

Now Therefore, It Is Hereby Stipulated and Agreed by and between appellants and appellee and their counsel, and by and with the consent of the United States Court of Appeals for the Ninth Circuit, as follows:

First: That the original files in said key case, Tillman vs. United States of America, No. 5190, including the pleadings and all proceedings had thereunder, and all of the original exhibits introduced into evidence, be forwarded to the United States Court of Appeals for the Ninth Circuit, as the record on appeal in these cases.

Second: That such original exhibits need not be printed and only so much of the Pre-trial Order and other proceedings as counsel for the appellants and appellee may desire. Said exhibits and the record may be considered by the Court in the original form with the privilege of counsel to print such portions of the same as an appendix to their briefs or by designation to the Clerk of the United States Court of Appeals as they may desire, and with the privilege of counsel to raise any question as to any finding of the District Court not being supported by the evidence.

Dated, this 12th day of November, 1954.

/s/ VIRGIL CRUM,

Of Attorneys for Appellants.

/s/ C. E. LUCKEY,

Of Attorneys for Appellee.

[Endorsed]: Filed December 9, 1954.

United States
COURT OF APPEALS
for the Ninth Circuit

MEARL C. TILLMAN and EMILY P. TILLMAN,
husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

(AND RELATED CASES)

APPELLANTS' BRIEF

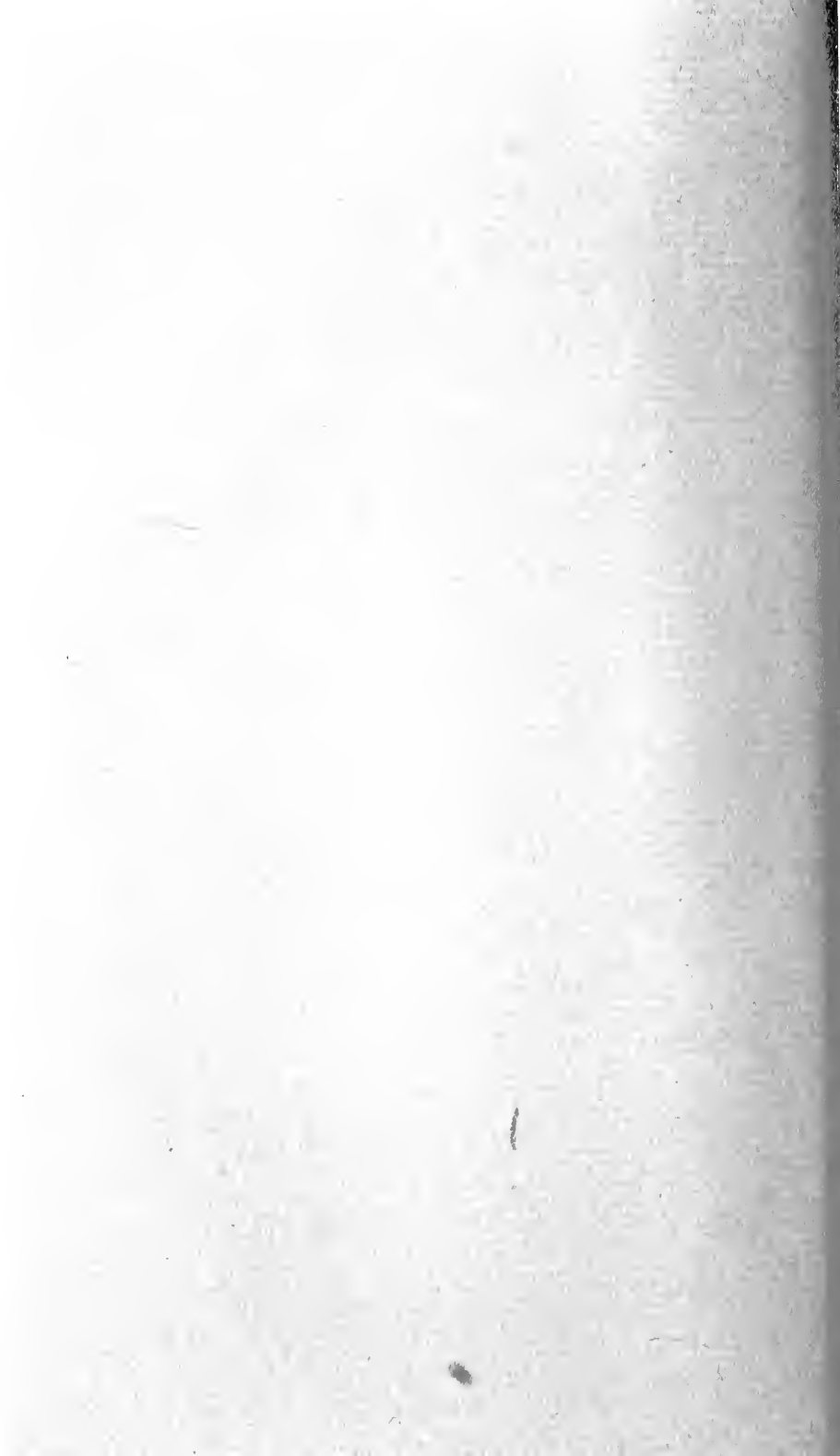
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United States
COURT OF APPEALS
for the Ninth Circuit

MEARL C. TILLMAN and EMILY P. TILLMAN,
husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

(AND RELATED CASES)

APPELLANTS' BRIEF

STATEMENT

In 1949 fifty-two separate actions were filed against the United States Government in the District Court of the United States, for the District of Oregon, under the Tort Claims Act for damages resulting from the cutting of an underpass through the western dike of Peninsula Drainage District No. 2 (Denver Avenue Embankment) and the consequent destruction of its protection against high waters. All of the plaintiffs and appellants were landowners in said Peninsula Drainage District No. 2.

These damage claims were based on the fact that the District had as its western boundary and protection the Denver Avenue Embankment which by recorded instrument the landowners had the right to rely on; that the United States, acting through F.P.H.A., wrongfully, unlawfully, negligently and deliberately cut an underpass through the same, thus destroying its effectiveness without providing substitute protection as required by Oregon law.

Inasmuch as the liability of the United States for such damage was identical in every case but the amount of damages different in each case, it was stipulated and agreed by all parties that the cases would be consolidated and tried together as to the legal liability of the United States only and that if judgment be for the plaintiffs they would be tried separately as to the damages, whereas if judgment be for the defendant it would dispose of all cases without further proceedings. One case was selected as a typical case and the proceedings were had under that title.

The evidence submitted consisted of about 62 pages of the PTO and many, many exhibits. Of course none of this is disputed by either party but much of the PTO and most of the exhibits are immaterial, outside the issues, and mere surplusage. In addition to the PTO there was a little over one day's oral evidence, mostly expert testimony. As the appellants see it, there was little or no consequential dispute in this oral evidence on any material fact.

The issues in this case appear to the appellants to be very simple. First, whether the landowners in Peninsula Drainage District No. 2 had the right to rely upon the Denver Avenue Embankment which they had contracted for, and second, whether the destruction of this protection by the United States of America, acting through F.P.H.A. without procuring the authority of the Circuit Court of the County of Multnomah and substituting therefor equal protection as required by the Statutes of the State of Oregon, was wrongful, entitling the landowners in District No. 2 to recover their damages.

The District Court apparently agreed with the appellants on every legal principle involved but avoided these legal principles on factual findings, all of which the appellants contend are contradictory to the agreed evidence. Thus the questions involved here are practically entirely questions of fact. Appellants have found it necessary to assign as error practically every factual finding in the opinion of the District Court and the findings.

Peninsula Drainage District No. 2 was organized in September 1917. It included approximately 1425 acres of bottomland along the Columbia River in close proximity to Portland. It is very rich and productive bottomland and is valuable for homes and industries. It is subject (without dikes) to overflow annually from the waters of the Columbia. In the organization papers it is described by metes and bounds but is referred to more briefly as being bounded on the west by Denver Avenue Embankment, formerly known as Derby Street; on the north by Columbia River; on the south by Columbia

Slough, and on the east by an extension of Columbia Slough, sometimes called the City Cut, or McBride Slough.

The Columbia River heads in Canada and flows for some 460 miles before it crosses the border into the State of Washington. It drains this vast area in Canada and from this as far south as Nevada, and from the Continental Divide on the east to the Pacific Ocean, a total of approximately 259,000 square miles (PTO R. 14). The high water in the Columbia is caused by the melting snows in the mountain area and reaches Portland every year usually in May and June. The height of the water each year depends entirely on how much of this vast mountain area is thawed out at the same time and obviously there is always a potential extreme high water locked up in the accumulated winter snows drifted over this extensive mountainous country. What may be called normal floods occur annually. The higher and critical floods occur less frequently but with more or less regularity (PTO R. 45).

Many diking districts have been organized up and down the Columbia by landowners in an attempt to salvage this rich bottomland. In many districts, as in Peninsula Drainage District No. 2, the Government has assisted in strengthening and building up dikes to protect against the ravages of this annual high water. When there is a critical flood there is always a fight to protect these lands from breaks in primary or secondary dikes and Government Engineer Diblee in his report on the 1948 flood (Ex. 66, R. 454) stressed the necessity of all pos-

sible precautions being taken including the elimination of the Denver Avenue Underpass which is the controversy in these actions.

In 1915 Peninsula Industrial Co. was the owner of the land on which Denver Avenue Embankment was later constructed as well as the land on both sides. On March 16, 1915 a deed was executed of an eighty foot strip of land for Denver Avenue (at that time known as Derby Street) running from Columbia Slough on the south to the bridge approach on the north (PTO R. 23, Ex. 68 R. 455). The sole consideration for the deed was the agreement contained therein, including an agreement on the part of the County for itself and successors to construct within three years and thereafter maintain an unbroken embankment across the same that would duplicate the bridge approach to the bridge crossing the Columbia River at the north end of such deeded strip.

This deed contained mutual easements. The County was given the right for itself and successors to slough over the toe of the fill on either side so much as necessary to maintain the embankment and the easement to use this toe on either side on private ground to maintain the embankment and the highway thereover. The grantor (Peninsula Industrial Co.) and its successors thereby retained the ownership of the embankment outside the 80 foot strip, subject to the easement of the County to use the same for a highway over the top and with the obligation of the County and its successors to maintain the same. In addition the grantor and its successors were given an easement to use the entire embankment and

hook on to it so long as it did not interfere with the right of way over the top. This deed was recorded in Multnomah County Deed Records, on March 26, 1915, in Book 687, at page 39 (R. 455). The highway was taken over by Oregon State Highway Commission by Resolution of its own Commission in 1937 (PTO R. 28).

The embankment was ultimately brought to a height of 37.6 feet with a crown width of 92 feet, of which 56 feet was paved, a base width of 317.6 feet and slopes of 1 foot to 3 feet (PTO R. 22). This leaves 118.8 feet of the embankment on each side belonging to private interests subject to the easement of the County and to its successors to use it for a highway over the top but with the condition they maintain it. This 118.8 feet could only be used by the County and its successors to maintain the fill, not to use it for road purposes.

By 1917 the fill had been constructed but not to its present height. In June 1917 Peninsula Drainage District No. 1 was organized taking in the land west of Denver Avenue and using that fill as its eastern boundary (PTO R. 25). By September 1917 there were 46 different owners of land making up what is now Peninsula Drainage District No. 2 (Ex. 26, R. 382). During that month District No. 2 was organized by these 46 owners making Denver Avenue embankment its western boundary. They asked and procured authority from the Court to build dikes to 28 feet around the other three sides, which was done (Ex. 26, R. 322).

There was no connection whatever between these two Districts except District No. 2 drained its surface water

at that time through a five foot culvert under Denver Avenue to a point in District No. 1 where the waters from both districts were pumped into Columbia Slough by a jointly owned pumping plant (PTO R. 25). This was temporary and later done away with.

December 21, 1926 a new deed was given by Peninsula Industrial Co. to Multnomah County to correct the description in the first deed (Ex. 69, R. 465). This second deed was identical with the first deed except for the description, and reaffirmed the mutual easement agreement and the agreement on behalf of Multnomah County for itself and successors to maintain the embankment. This deed was also recorded in Multnomah County Deed Records on December 31, 1926. Book 182, p. 298 (Ex. 69, R. 465).

In 1928 a reorganization plan was filed in the Probate Department, Multnomah County Circuit Court, by the Supervisors of District No. 2 (PTO R. 25). They represented to the Court that their western boundary, Denver Avenue Embankment, had been built to a height of 33 feet. That Multnomah District No. 1, to the east (not to be confused with Peninsula Drainage District No. 1 to the west) had built its dikes to a height of 32 feet. They asked and received the authority to build the north, south and east dikes to 33 feet to afford the same protection as Denver Avenue embankment at 33 feet. They also asked and received the authority to assess the land in District No. 2 \$25 per acre to cover the expense (PTO R. 27). No mention whatever was made in this proceeding of Peninsula Drainage District No. 1.

Following this reorganization plan and in compliance therewith District No. 2 with aid of the government authorized by Act of Congress, rebuilt and strengthened its north, south and east dikes to a height of 33 to 35 feet (PTO R. 19).

During the same period the Highway Commission increased the size, height and strength of Denver Avenue embankment to a height of 37.6 feet, width at base of 317.6 feet, crown width of 92 feet, with 56 feet of pavement (over 3 times the size and strength of the strongest of the primary dikes) (PTO R. 22).

At the same time the culvert through Denver Avenue was plugged by the W.P.A. under government engineers' (Appendix B) supervision and a new pumping plant put in by District No. 2 entirely within its own borders, pumping its surplus waters into Columbia Slough. Thereafter there was no connection whatever between Districts Nos. 1 and 2.

Peninsula Drainage District No. 1, in which the F.P.H.A. built its housing project did not surround its district with dikes. It adopted Denver Avenue embankment as its eastern protection, built dikes on the north and south but on the west it hooked on to railroad fills over which it had no authority whatsoever (PTO R. 35). They were entirely within the control of the railroads and the District had no authority to strengthen or protect them or to hook onto them. The S. P. & S. fill which broke during the 1948 flood was built in 1907-1908 (PTO R. 38). A wood trestle was built from which dry sand was hauled and dumped over the trestle. The stringers

in the trestle were removed but the piling was not. No showing was made that there was ever an intention to make this a water repellent structure, in fact it was built ten years or more before the organization of Peninsula Drainage District No. 1 during which time it was not subjected to side water pressure. Therefore there was no reason for making it water repellent. The building of the north and south dikes by District No. 1 subjected this railway fill to side water pressure by permitting the water to flow on but one side. This they are not shown to have had any right to do.

During the ten year period prior to the high water of 1948, Peninsula Drainage District No. 2 was completely put under cultivation and improvements. There were many buildings and industries built, including Portland Meadows Race Track with its expensive buildings, an auto track with its buildings, an open-air theater, a golf course, a building material business, other businesses and industries, a great many homes, many of them fine expensive homes, and a grade school (Ex. 66, R. 450).

There is no evidence to show what happened in Peninsula Drainage District No. 1 except that the evidence shows that the United States was able to acquire a mile square of land upon which Vanport was built (PTO R. 46) and that the industries along the north side were built on high ground and were originally outside the District (PTO R. 33).

There is no evidence as to why the development in District No. 2, and not No. 1, except from inferences which may be drawn from the facts. It would be difficult

and perhaps impossible to produce specific evidence on this point. The inferences, however, appear to be quite clear to the appellants.

That inference would be that the people in District No. 2 depended upon and had confidence in and had the right to the protection afforded by the Denver Avenue embankment, while the people in District No. 1 had little or no confidence in the railroad fills and no right to use them.

On October 20, 1942, Kaiser Co. Inc. having a contract with the United States to build Vanport, subcontracted the work of building an underpass through Denver Avenue embankment to Tower Sales & Erecting Co. (PTO R. 49). The work on this underpass started on or about November 2, 1942 (PTO R. 49). On November 12, 1942 (ten days after work had begun on the underpass) a contract was made between F.P.H.A. and the State Highway Commission whereby F.P.H.A. was given permission to construct an underpass through Denver Avenue embankment to afford access to the F.P.H.A. housing project in District No. 1. F.P.H.A. by the same instrument agreed to construct the underpass and to pay the upkeep. This contract shows the underpass to have been a private way to Vanport and no part of a public highway (Ex. 23, R. 293). It had no connection with District No. 2.

The Statutes of Oregon provided as follows:

Section 123-216 O.C.L.A. — ORS 551.140

“REALIGNMENT OF DIKES BY LAND-OWNERS: PROCEDURE; EXPENSE: OWNER-

SHIP OF NEW DIKE. Any person through whose lands dikes shall have been constructed under this act may be allowed to construct a dike upon new lines between any two points on the original line. In such case the owner shall file application with the county court, giving a plat of the proposed change, and indorsed by the superintendent of the district. If the court is satisfied that the change is not detrimental to the district, the application shall be granted. The applicant shall construct the new dike at his own expense, and up to the standard of the original, of which fact the superintendent shall be the judge. The dike thus constructed shall become the property of the district in the same manner as the original, and subject to the same regulation, and the right of way of the original dike thereon becomes vacated."

(Section 123-216 was made applicable to Drainage Districts by Section 123-206 O.C.L.A.)

No proceeding was taken or attempted under this Statute, and it was entirely ignored by the Court. The underpass was cut with no authority whatever except permit from State Highway Commission, which had no authority whatever to give such permission or to cut any such underpass on its own account. It was cut in violation of the landowners' easement, and that easement and the protection District No. 2 had from Denver Avenue embankment was completely destroyed. The government's expert witness, Mr. Willard J. Turnbull, testified it would be unsound to take out a secondary dike that was in place (R. 244).

On or about February 19, 1943, F.P.H.A. started construction of a ring levee with the ostensible purpose of

protecting the underpass. It was completed during April of 1943 (PTO R. 50).

This ring levee was 800 feet in length. It was constructed on land condemned by the United States on the east side of Denver Avenue to the 80 foot highway strip as its western boundary, and running north and south from the underpass. In the Declaration of Taking (Ex. 78, R. 471) it was recited that title in fee to this property was claimed, *subject to the easement of District No. 2.*

F.P.H.A. undertook to maintain the ring dike after it was built. H.A.P. took over the operation of Vanport for F.P.H.A. and it was their duty to regularly inspect and maintain the ring dike (PTO R. 53). In 1944 cracks and sloughs showed up in the ring dike. It was repaired by filling the cracks. Inspections continued until the 1948 flood and no other defects were observed by H.A.P. employees.

However, Mr. Kenneth R. Diblee, the Government Engineer, in his completion report (Ex. 66, R. 449) said:

"This protective levee had a longitudinal crack extending along the top of its northerly portion, which was reported to have formed not long after original construction was completed."

At the time the cracks showed up in 1944 two employees of H.A.P. obtained the services of a government engineer and on his report they reported to F.P.H.A. that the ring dike was inadequate. It would require \$9000 to bring it up to standard. They reported this to F.P.H.A. but were scolded for their interference and that work was not done. These two employees were Donovan C.

Byers (Ex. 32, R. 354, 363) and Clinton S. McGill (Tr. R. 192, 193).

This ring dike was constructed of dry sand. In the fall of 1943 more work was done on this levee increasing its height to 34.9 feet with a crown width of 12 feet at the north and gradually reducing in width to 7.5 feet. The inside or western slope had a slope of 1 foot on 2 feet, the outside or eastern 1 foot on 1½ feet. The average base width 100 feet. The eastern slope had a clay blanket 3 feet in thickness to protect it from waters approaching from the east. There was no such blanket on the west to protect it against waters from the west. An 18 inch pipe or culvert was placed beneath this ring dike to drain waters from west to east. A flood gate was placed on the eastern end to prevent flood waters from District No. 2 on the east flowing through into District No. 1 on the west. There was no similar protection given to District No. 2 from flood waters flowing from west to east (PTO R. 50, 52).

It isn't even contended by the United States that this ring levee gave any protection to District No. 2. In fact they take the contrary position that it was never so intended. Their contention No. 41 (PTO R. 100) reads as follows:

"That no agency or employee of the United States was authorized or instructed by Congress to build or maintain the ring levee for the benefit of plaintiff or to provide flood protection of any kind to plaintiff; and nothing any employee of the United States did or did not do in that connection was within the scope of his employment."

Their contention No. 23 (PTO R. 96) says it was intended to protect the Vanport residents and the \$25,000,000 investment of the United States in Vanport.

The United States produced no witness who engineered the construction of this ring dike nor anyone who had charge of it or knew why it was built or for what purpose. They produced two expert witnesses, Mr. Willard J. Turnbull of Vicksburg, Mississippi, and Mr. Thomas A. Middlebrook of Alexandria, Virginia. Each testified that judging from its construction it was built to protect the government's investment in Vanport against waters topping the dikes around District No. 2, which were 1.7 feet lower than the dikes around District No. 1. They each testified it was not constructed to protect against water coming from the west (Tr. R. 226, 239).

So it is clear that the ring dike never was and never intended to be, nor is there any contention on the part of the United States, that it was adequate to give any protection to the landowners in Peninsula Drainage District No. 2. It was, however, sufficient in size when compared to the outside dike to afford apparent protection. The defects in it which made it useless against waters from the west were hidden and concealed and not apparent to the layman's eye. The inference must follow that the construction of the ring dike and its maintenance until the flood in 1948 was sufficient to lull the landowners in District No. 2 into a sense of security and encouraged them into continuing with building and improvements in reliance on the protection the United

States was giving them. This is particularly true in view of Section 123-216 O.C.L.A., ORS 551.140, above quoted, which placed a duty on the United States to substitute equal protection to the Denver Avenue embankment. In any event the District No. 2 landowners were given no choice but to rely on this ring levee for protection. The underpass could only be protected by a ring dike. The United States owned the land on the west and condemned the land on the east for the very purpose of constructing a ring dike to protect the underpass. Thus the landowners in District No. 2 were deprived of any possible way whatever of protecting themselves.

Prior to the construction of this underpass the Denver Avenue embankment had always been preserved for the protection of both districts, Peninsula Drainage District No. 1 and Peninsula Drainage District No. 2. Mr. Baldock, Chief Engineer for the State Highway Commission, testified that he knew these districts claimed the Denver Avenue embankment as a dike (Tr. R. 251). He denied they had the right to rely on it but had never seen the deed under which that right was given. However, the Highway Commission built two other underpasses through the embankment. One was at the south end by Columbia Slough to permit travel off Gertz Road. In this instance the south dike in District No. 2 was moved to the north by the Highway Commission and reconnected with the Denver Avenue embankment to permit the underpass to be placed outside the dike and thus preserve the Denver Avenue embankment (PTO R. 29). By doing this the Highway Commission had to recognize the Denver Avenue embankment as a dike.

Later the Highway Commission placed an underpass at the north end in connection with a traffic interchange near the bridge. In that instance the Denver Avenue embankment was preserved by using the high ground and filling in from Union Avenue to North Portland Road, and from Denver Avenue to North Portland Road (PTO R. 28). This resulted in a lowering of the embankment at that point by approximately 4 feet making it 33.6 feet (slightly more than the outside dike). The PTO also mentions 31 feet but this was apparently an error and was caused by deducting 4 feet from the height of the fill as alleged in the complaint to be 35 feet. The actual height of the fill, however, was 37.6 feet making the lowering to 33.6 feet. At any rate no water topped the embankment at this point and the flood was reported to have reached 32.44 feet (PTO R. 79).

On May 30, 1948, a section of the S. P. & S. railroad fill on the west of Peninsula Drainage District No. 1 broke permitting the flooding of that district. What happened then is best told by Government Engineer Kenneth R. Diblee in his completion report (Ex. 66). We quote from that portion of this report which was not printed in the Transcript of Record. On page 13 of said report we find the following:

"At approximately 4:30 p.m. on May 30, 1948, the S. P. & S. Railway embankment forming the westerly levee of Peninsula Drainage District No. 1 blew out causing that district to fill quite rapidly. Water filled the underpass through Denver Avenue and as it deepened therein Diblee noted that on the inside toe of the circular dike protecting the underpass a gusher developed which appeared to be a

manhole of approximately 30 inches in diameter which gushed to an approximate height of about 2 feet above ground level. Attempts were made to plug this with sandbags but it was impossible to stop it. South of this gusher an apparent 8-inch pipe started flowing."

Quoting from page 15 of the same report, we find the following:

"* * * and the circular dike around the underpass through Denver Avenue was being worked on by first attempting to place a sandbag layer on the outside slope to give the fill more weight, but as this was deemed a very dangerous operation by Mr. H. K. Doyle and Mr. Baldock, Oregon State Highway Engineer, this method was discontinued and an attempt was made to fill the underpass opening by trucking in sand and gravel material and dumping it on the underpass roadway."

And at the bottom of page 15, we quote the following:

"B. *Date of Occurrence and Description of Major Break and Flooding of Area*—At approximately 9:00 p.m. on May 31, 1948, the semi-circular levee around the underpass through Denver Avenue gave way, immediately widening due to the great velocity of flow until it ultimately was approximately 400 feet wide. The water from the Vanport area poured into the area of Peninsula No. 2 between Denver and Union Avenues filling it quite rapidly. Buildings afloat in the Vanport area were carried through the breach into the other area.

As Peninsula No. 2 had been evacuated on orders of the Multnomah County Sheriff soon after the Vanport disaster on May 30, 1948, there was no loss of life occasioned by the filling of the area between Denver and Union Avenues."

And from subdivision V, page 17, we quote the following:

“Property damage to buildings was very great, as many one-story buildings were floated from their foundations and carried away. Other buildings which were not moved were partially immersed resulting in the warping of siding and flooring, ruining of plaster walls and the water staining of all parts immersed. Shrubbery around homes and crops were practically 100% ruined. A very few houses along Marine Drive built on high foundations or on high ground escaped flood damage. Columbia-Edgewater Club House suffered considerable damage to its basement from immersion and the golf course was totally immersed killing the grass cover.”

JURISDICTION

These are actions for the recovery of damages from the United States of America under the Federal Tort Claims Act. The causes of action arose May 31, 1948, being the date of the flooding of Peninsula Drainage District No. 2 in Multnomah County, Oregon.

This flooding was caused by the cutting of an underpass by the United States Government through F.P.H.A. without providing equal protection against floods for District No. 2. These actions were filed in the United States Court, for the District of Oregon, within two years after the rights of action arose. Jurisdiction over these actions in the District Court is provided under 28 U.S.C.A. 1346(b). Judgment in favor of the appellee and against the appellants was entered September 14, 1954 (R. 148). Notice of Appeal was filed November 9, 1954 (R. 149). Jurisdiction of this Court to hear and determine this appeal is conferred by 12 U.S.C.A. 1291.

ASSIGNMENTS OF ERROR

An explanation seems necessary as to our first assignment of error. The Court in the first paragraph of its Findings of Fact adopts the Findings of Fact in the opinion of the Court and the Findings of Fact set forth in paragraphs 1 to 20, inclusive of Section C of the Pre-trial Order. The Findings of Fact in the Pretrial Order, in the opinion of the appellants, would support only a judgment in favor of the appellants, whereas the Findings of Fact set forth in the opinion are found by the Court to support a judgment for the defendant. Every statement of fact contained in the opinion of the Court is, we believe, contradicted by statements of fact in the Pretrial Order. This leaves the findings in such a nebulous state we find it extremely difficult to point out specific error. It seems necessary to counsel, therefore, in view of this finding to point out the errors in the factual findings in the opinion.

In the opinion as it appears to the appellants, the Court attempts to find Peninsula Drainage District No. 2 adopted the railroad fills on the west side of Peninsula Drainage District No. 1 (which the Court refers to as the western embankment) as its protection on the west and that the breaking of the railway fill was the cause of the flooding of District No. 2. That it never depended on the Denver Avenue Embankment. By adopting this erroneous theory it seems to have become necessary in the Court's opinion to make further findings of fact that Denver Avenue Embankment was merely an after-

thought and was not intended as a dike; that it was never adopted; that it wasn't sufficient to act as a dike, etc. in order to discredit and eliminate the Denver Avenue Embankment from consideration, all of which findings were erroneous and contradicted by the PTO. We will attempt to point out the erroneous findings in the opinion of the Court, subdividing and grouping them as follows:

(a) The Findings as to Peninsula Drainage District No. 2 adopting the railway fill for its western protection, and

(b) The Findings tending to discredit and eliminate the Denver Avenue Embankment from consideration.

With this explanation as to appellants' assignments of error as to paragraph I of said Findings of Fact, the appellants make the following

ASSIGNMENTS OF ERROR

I

The Court erred in adopting the Findings of Fact in the Court's opinion and at the same time adopting Findings of Fact in the PTO without specifically setting forth such findings. More specifically appellants assign as error the following factual findings set forth in the opinion of the Court.

(a) The Court erred in the following factual findings set forth in its opinion, on page 1 of said opinion (R. 127) as follows:

Par. 1 "The consideration of the deed to this strip was the erection of a mound carrying a highway which was to be maintained by the county. In accordance therewith, a highway, one of the approaches to the Interstate Bridge across the Columbia River to Vancouver, Washington, was placed on this bank."

And on page 2 of said opinion (R. 128) the following:

Par. 2 "District No. 1 was protected from flood on the north, west and south by railroad fills and by constructed levees, none of which was owned or managed by the United States. These same works protected District No. 2 on its western side. District No. 2 built dikes between 1917 and 1921 on its north, south and east sides, which connected with the works of District No. 1 above described, and thus accomplished complete circumvolution of both. Neither district spent time or money in attempting to strengthen the mound carrying Denver Avenue."

And again on page 2 (R. 128) as follows:

Par. 3 "The United States, also pursuant to congressional authority, rebuilt the north and south levees of District No. 1. Notwithstanding the plans for the work were approved by District No. 1, there was no suggestion from anyone that the western embankment, owned and in control of the railroads but adopted by both districts as an existing work, should be reconstructed or strengthened by the United States."

And on page 6 (R. 132), as follows:

Par. 4 "District No. 2 adopted the western embankment as one of its guards against overflow, as it did the other works which primarily defended District No. 1.⁷ This the District had a legal right to do under the statutes of the state.⁸ The breaking of the western embankment upon which these landowners relied for safety was the sole cause of disaster."

Note No. 7 referred to above, set forth at the bottom of page 6 of the Court's opinion (R. 132), reads as follows:

Par. 5 "The Plan for Reclamation adopted by District No. 2 recited that District No. 1 was protected 'by its west, north, and south levees, connecting with system No. 2'. District No. 2 planned to construct levees on the east, north and south. The Plan concluded, 'It is apparent that this will affect a complete closure of the land included in this district against high water.' "

(b) The Court erred in the following factual findings in its opinion tending to discredit and eliminate the Denver Avenue Embankment as protection for Peninsula Drainage District No. 2.

On page 3 (R. 129) of said opinion, the following finding:

Par. 1 "The State Highway Commission which had already constructed two underpasses² in Denver Avenue, was requested to and did build with federal funds an underpass through the fill for the convenience of persons living in both drainage districts. No protest was made by District No. 2, nor any suggestion by anyone that District No. 2 needed protection from waters from the west. It is true, a resolution mildly suggesting that objection to the construction of the underpass without a 'stop log' was passed by its board of directors and placed among the minutes of the Board, but it seems never to have been called to the attention of anyone outside this group."

Note No. 2 referred to by the Court and appearing on the bottom of page 3 (R. 129), reads as follows:

Par. 2 "One of these was not within the boundaries of the levee systems of Districts Nos. 1 and 2, and in the other affected the system in no way but to lower the Denver Avenue fill by four feet."

Continuing with the next paragraph on page 3 (R. 130):

Par. 3 "However, upon protest of District No. 1, a ring levee was built on land condemned by the federal government at the opening of the underpass upon the upriver side in District No. 2. The purpose of this ring levee was to afford some protection to District No. 1 from overflow by floodwater from the east if the dikes of District No. 2 were overtopped. As is readily seen, this fill, including the ring levee, could have been strengthened as a part of the work which was then being done upon the other protective works of the two districts by the United States engineers. This ring levee did in fact afford some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when the western embankment failed.

"On May 30, 1948, between 4:00 p.m. and 4:30 p.m., in one of the greatest floods of the Columbia River in recorded history, the western embankment, which was the railroad fill adopted by these districts, failed, permitting the water flooding to overflow that area. The waters were held by the Denver Avenue highway fill until between 9:00 p.m. and 10:00 p.m. on May 31, 1948, when the ring levee constructed on the east of the underpass to protect District No. 1 from water approaching from that direction failed, and, as a result, District No. 2 and the properties of plaintiffs were inundated.

"This is a case of afterthought, not forethought, on the part of plaintiffs and District No. 2."

Continuing with the second paragraph on page 6 (R. 130), the Court found:

Par. 4 "The government did not construct or have control over Denver Avenue or the bypass, although this was built with federal funds, and the ring levee stood on lands which it had condemned. Denver Avenue was not designed as a water repellent wall.¹⁰ It is

specifically stated that no reliance was placed upon it, and it is mentioned only casually as furnishing additional protection. In fact, it did so even in this disaster. But no one contemplated Denver Avenue as a bulwark against the weight of water such as was cast against it when the western embankment broke."

Note No. 10 at bottom of page 6 (R. 133), referred to in this statement, reads as follows:

Par. 5 "Plaintiffs contend that language of the deed from Peninsula Industrial Company to Multnomah County establishes their right to have Denver Avenue maintained as a dike. They place their reliance on the following: '* * * this conveyance is made upon the following express conditions: * * * (a) * * * Multnomah County shall * * * construct * * * a fill and embankment * * * and shall * * * provide and thereafter maintain a public highway [thereon] * * *'"

Continuing on page 7 (R. 134), the Court said:

Par. 6 "It is true that one who destroys a dike against flood waters would be liable for damage proximately caused thereby. But for six years after the underpass was cut and the ring levee constructed, the Drainage District, which had the continuous duty of maintenance, strengthening and repair, did not do anything with either Denver Avenue or the western embankment. All this time, the District possessed sovereign power of eminent domain and assessment for these express purposes. Therefore, the cutting of the underpass and the failure to provide unbreakable work may have been a condition which resulted in damage, but it was not a cause, proximate or otherwise." (We do not assign the first sentence here quoted as error.)

On page 9 of said opinion (R. 137), the Court found as follows:

Par. 7 "Here, the United States is not liable. The government owed no duty to these landowners. The employees of the Portland Housing Authority are not shown to have done anything legally significant. The United States was not responsible for the failure of the western embankment, which was the sole cause of disaster. The government had not deliberately banked waters high over the lands of plaintiffs and permitted these to overflow. No liability was thus established by creating a highly dangerous situation. These were flood waters and were not part of a column of water which agents of the government were conducting when the break occurred. So there could be no trespass. The government agents were not in control of the waters so that the doctrine of *res ipsa loquitur* would apply. No act or omission was proved which constituted negligence on the part of any agent of the government. Finally, the United States is not liable for damage caused by flood.

"Findings, conclusions and judgment in accordance herewith and in favor of the United States should be drawn by the attorneys and submitted to the Court."

The appellants assign as error all of the Findings set forth above and all of the findings of fact contained in the said opinion of the Court which were in contradiction with the PTO and the evidence.

II

The Court erred in its Finding No. 3 of the findings of fact (R. 140) in that portion thereof which reads as follows:

"District No. 2, in which plaintiffs owned property, adopted these works (which primarily protected District No. 1) as protection for District No. 2 from the west. On the north, south, and east District No. 2 built dikes which connected with the works of District No. 1, thus accomplishing a complete circumvolution of both districts. None of these fills, dikes and levees was owned or controlled by the United States."

III

The Court erred in Finding No. 4 of said findings of fact (R. 141) as to the following portions thereof:

"For the convenience of persons living in both districts an underpass through the Denver Avenue fill was built with federal funds. * * * No protest against construction of the underpass was made by District No. 2. A resolution mildly suggesting objections to the construction of the underpass without a stop-log structure was passed by its board of directors, but it seems never to have been called to the attention of anyone outside that group."

IV

The Court erred in Finding No. 5 of said findings of fact (R. 141) as to that portion thereof which reads:

"Upon protest of District No. 1, a ring levee was built, on land condemned by the United States, at the opening of the underpass upon the upriver side and in District No. 2. * * * As a matter of actual fact the ring levee also afforded some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when on May 30, 1948 the western embankment of District No. 1 failed."

V

The Court erred in its Finding No. 7 of said findings of fact (R. 142) as to the following portions thereof:

"The failure of the western embankment at District No. 1 was the sole cause of damage to plaintiffs. That embankment, a fill designed to carry railroads and owned and controlled by the railroad companies, had been adopted by both Districts Nos. 1 and 2 as one of the flood protective works. * * *"

VI

The Court erred in Finding No. 8 of said findings of fact (R. 142) as follows:

"Denver Avenue, the boundary between the two districts, was not intended to be a levee and was not designed as a water-repellent wall or structure. The Plan for Reclamation of District No. 2 specifically stated that no reliance was placed on Denver Avenue, and Denver Avenue is mentioned only casually as furnishing additional protection. Neither District No. 1 nor District No. 2 ever spent time or money in attempting to strengthen Denver Avenue. * * * Neither Multnomah County, the State of Oregon, the United States nor anyone else has or had any obligation to maintain Denver Avenue as a levee or for flood protection purposes."

VII

The Court erred in Finding No. 9 of said findings of fact (R. 143) as follows:

"In the exercise of due care, there was no reason to anticipate a failure of the western embankment or any embankment of District No. 1, and hence no reason to anticipate that flood waters would ever approach Denver Avenue and the ring levee from the west. No one contemplated Denver Avenue as a bulwark against a weight of water such as was cast against it when the western embankment at District No. 1 broke. The failure of the ring levee and the inundation of the plaintiffs' property resulted from a set of circumstances unforeseen by anyone, includ-

ing plaintiffs, and which in the exercise of due care could not have been foreseen."

VIII

The Court erred in Finding No. 10 of said findings of fact (R. 144) in making the following finding recited therein:

"District No. 2 at no time contributed to the construction or maintenance of Denver Avenue, and during the entire period of approximately six years between the time when the Denver Avenue underpass and ring levee were constructed and the time of the 1948 flood, District No. 2 did nothing with respect to Denver Avenue, the underpass or the ring levee. District No. 2 and not the United States had the duty of providing flood protection for lands within the District. District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands. The construction of the underpass and the failure to provide an unbreakable ring levee was not the cause, proximate or otherwise, of any damage to plaintiffs."

IX

The Court erred in its Finding No. 12 (R. 145), which reads as follows:

"The employees of the Housing Authority of Portland are not shown to have done anything legally significant. Plaintiffs have failed to prove any negligence or wrongful conduct on the part of the Housing Authority or its employees."

X

The Court erred in its Finding No. 13 (R. 145) which reads as follows:

"Plaintiffs have failed to prove any negligence or wrongful conduct on the part of the United States

or its employees or that plaintiffs suffered damage on that account."

XI

The Court erred in its Finding No. 14 (R. 145) which reads as follows:

"Plaintiffs have failed to prove that the construction of the Denver Avenue underpass or the construction or maintenance of the ring levee surrounding that underpass violated any right of plaintiffs, that the ring levee was inadequate for the purpose intended or that, under the circumstances, the purposes for which the ring levee was constructed were not the proper purposes."

XII

The Court erred in its Finding No. 15 (R. 145) which reads as follows:

"The contentions of plaintiffs as set out in the pretrial order that the construction of the Denver Avenue underpass was negligent, wrongful and a trespass on plaintiffs' property, that the Denver Avenue fill constituted a levee and, as such, part of the plan for reclamation of District No. 2, that plaintiffs relied on the Denver Avenue fill as security against flood waters, that the ring levee around the Denver Avenue underpass was inadequate and unsuitable for the purpose intended, that the ring levee was negligently maintained and constituted a nuisance, and that the County of Multnomah and its successors in interest had an obligation to maintain the Denver Avenue fill as a dike, have not been proved."

XIII

The Court erred in its Finding No. 16 (R. 146) which reads as follows:

"The United States has proved facts sufficient to establish that it had no duty to protect plaintiffs or

their property, that nothing done or left undone by the United States or its employees constituted a violation of any right of plaintiffs, and that there is no proof of any wrongful act or omission on the part of the United States or its employees."

ASSIGNMENTS OF ERROR IN THE CONCLUSIONS OF LAW

XIV

The Court erred in its Conclusion No. 1 (R. 146) adopting its Conclusions of Law set out in the opinion of the Court.

It is perhaps unnecessary to go into the Conclusions of the Court in the opinion as the same conclusions seem to be repeated in the Conclusions of Law signed by the Court.

XV

The Court erred in its Conclusion of Law No. 5 (R. 146) in its entirety, which reads as follows:

"Under the law of Oregon the legal duty to protect plaintiffs' property from flood damage rested on Peninsula Drainage District No. 2 and on plaintiffs themselves as land owners within the district. This duty was continuous and involved the repair, maintenance and strengthening of existing flood protection structures. Neither the United States nor its employees owed plaintiffs any duty to protect plaintiffs' land from overflow or flood damage."

XVI

The Court erred in its Conclusions of Law No. 6 (R. 147) in its entirety, which reads as follows:

"The sole cause of damage to plaintiffs was the failure of the western embankment at District No. 1. The United States was not responsible for the failure of the western embankment and no act or omission of the United States or its employees had casual connection with any damage to plaintiffs' property."

XVII

The Court erred in its Conclusion of Law No. 7 (R. 147) which reads as follows:

"Neither the United States nor its employees has been proved to be guilty of negligence or wrongful conduct within the meaning of the Federal Tort Claims Act."

XVIII

The Court erred in its Conclusions of Law No. 8 (R. 147) which reads as follows:

"The provisions of 33 U.S.C.A. 702(c) that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River Basin; and it is not repealed by the Federal Tort Claims Act."

XIX

The Court erred in its Conclusion of Law No. 9 (R. 147) which reads as follows:

"The United States is entitled to judgment."

XX

The Court erred in its concluding paragraph of said Conclusions of Law (R. 148) which reads as follows:

"These findings of fact and conclusions of law are in accordance with the pretrial order, the record made on the trial of the actions and the opinion of the Court heretofore filed in these consolidated cases."

SUMMARY OF ARGUMENT

We wish to call the Court's attention to the very excellent and instructive opinion of the Court in *Clark vs. United States*, 13 F.R.D. p. 342, wherein the Court said, at page 345:

"When a plaintiff has by his counsel advised the Court and defendant of the theories upon which he relies and has given account of these, then the Court should not adopt some other theory of recovery, even if it should be believed that such a theory was more applicable. The other side has also a right to rely upon the theory stated by the counsel for the plaintiff, and it is entire justice to require the defendant to accept some theory of law propounded by the Court for the first time in the opinion. Likewise, the defense in these cases very carefully sets up theories of defense. Here also the same considerations prevail. The defendant should be bound by such theories as well as the plaintiff, and the Court should not find some other ground on which to deflect the attack. If it should be believed either by the trial judge or the appellate judges that the theories are incorrect and do not fit the facts, then the case should be remanded for the purpose of drafting a new pre-trial order and these things should then be set forth. In this instance, it is believed that the pre-trial order covers very exactly both the theory of recovery and the theories of defense."

In the instant case the issues were very simple and very clear. The plaintiffs contend in their pleadings and in the PTO that District No. 2 adopted for its western boundary and protection the embankment supporting the Denver Avenue highway. That it was wrongfully destroyed by the cutting of an underpass by F.P.H.A. with-

out protecting it as required by the laws of the State of Oregon. The appellee set up many defenses trying to excuse its conduct. There was no contention on either side and nothing within the PTO in which an issue could be adopted to the effect that District No. 2 had for its western protection the railroad fill, a mile or two to the west ,outside of the District, over which it had no jurisdiction whatsoever. No evidence was introduced. Nothing appeared in the PTO and no contention was made that the appellee had any responsibility for the breaking of the railroad embankment nor that District No. 2 put any reliance thereon. That simply was not within the issues.

We believe there could be no better demonstration of the wisdom of the quotation from *Clark vs. U. S.* supra than the instant case.

Here the Court has adopted an entirely different theory than was presented by either the appellants or the appellee and entirely different from anything that could be taken from the PTO, and that is that District No. 2 depended upon the railroad fills a mile or two outside the District for protection from the west and since the appellee was not responsible for the breaking of that fill it was not responsible for the damage that resulted to the appellants from the destruction of the Denver Avenue Embankment.

We are unable to understand the adoption of this theory by the District Court except that that was the identical theory underlaying the so-called Vanport cases involving the flooding of District No. 1. The Court in

those cases, as shown by his excellent opinion, made a very thorough diagnosis. It seems to counsel for appellants that the decision in this case was written on the assumption that the same theory was involved. In order to uphold such a theory it became necessary to eliminate the Denver Avenue Embankment located on the western border of District No. 2 completely and to handle the matter as though District No. 1 and District No. 2 were in fact one and that neither District relied on the Denver Avenue Embankment any more than if it was not there.

The result of this change in the issues was that practically every legal point involved was determined in favor of the appellants but the results thereof avoided by Findings of Fact contrary to the evidence contained in the PTO, which of course is not subject to dispute. In the testimony taken there was little or no dispute and certainly it is believed by appellants that there was no dispute of any materiality.

Practically all of the Findings of Fact are believed by the appellants to be in direct contradiction to the undisputed evidence contained in the PTO. We have assigned as error practically every factual finding that was made in the opinion as well as in the Findings of Fact. In the Findings of Fact the Court adopted the factual findings in its opinion so it appears to the appellants necessary to assign these factual findings in the opinion as error.

For the reasons just stated this brief must necessarily apply principally to the facts as it is believed that a correct finding of the facts in accordance with the undis-

puted PTO will necessarily resolve all legal points in favor of the appellants.

The only way we have been able to classify these findings is by the substance. The factual findings run throughout the opinion as well as the findings of fact and in many different places refer to the same substance. In many instances two or more matters of substance are referred to in the same paragraph and sometimes in the same sentence. Therefore, we have had to jump from here to there to gather these factual findings in the opinion and findings of fact in order to treat them together. We have tried to classify these as follows:

THE COURT FOUND THAT:

1. Peninsula District No. 2 adopted as its western protection the railway fills on the west, a mile or two outside the District, and that was the cause of the flooding of District No. 2, although that was not within the issues of the case and is contradicted by the PTO. On this erroneous assumption the Court adopted an entirely new theory of the case, entirely outside the issues presented by the pleadings or the evidence.

2. Denver Avenue Embankment was not designed to repel a wall of water equal to the 1948 flood, whereas it was built as a bridge approach to withstand any high water and was adopted by the appellee to withstand a wall of water 4 feet in excess of the 1948 flood.

3. No one anticipated the breaking of the railway fill although the appellants did and had provided against it.

4. Comparison of dikes. District No. 2 made no effort to strengthen Denver Avenue Embankment although it was more than three times the size of any primary dike and the County and Highway Commission had a written obligation to and did maintain it.

5. Dependence on Denver Avenue Embankment was an afterthought, although appellants had anticipated its need 33 years before the flood and had provided for it to always be maintained and had always relied upon it.

6. No objections were made to the cutting of the underpass, although appellee gave no notice of intention to cut same and strenuous objections were made to the Highway Commission against it.

7. The appellee owed a duty to protect against the underpass but owed no such duty because the appellants failed to protect against it themselves after the appellee had wrongfully cut it.

8. District No. 2 had no right to use the Denver Avenue Embankment although it had an easement therefor, but F.P.H.A. had the right to destroy that easement and to appropriate the embankment for its own exclusive use without any such easement or agreement therefor.

9. The appellants failed to protect against the underpass by construction of dikes themselves, whereas the appellee had made that impossible. The ring dike as built afforded District No. 2 some protection, whereas it was only a concealed trap.

10. Two underpasses were cut through Denver Avenue Embankment and therefore the unbroken embank-

ment was not maintained by the Highway Commission, whereas in each instance the underpass was protected by the Highway Commission and the unbroken protection thus preserved.

11. There was no trespass although the easement of the appellants which was recognized by the appellee was destroyed without authority and because of it all of appellants' lands were inundated.

12. There was no negligence or wrongful conduct on the part of the United States or any of its employees, whereas there is an abundance of evidence that every act taken by the government or its employees was wrongful in the first instance and that they were negligent in every act taken by failing to provide protection for the landowners in District No. 2.

ARGUMENT

Item 1. THE COURT FOUND THAT:

Peninsula District No. 2 adopted as its western protection the railway fills on the west, a mile or two outside the district, and that was the cause of the flooding of district No. 2, although that was not within the issues of the case and is contradicted by the PTO. On this erroneous assumption the Court adopted an entirely new theory of the case, entirely outside the issues presented by the pleadings or the evidence.

In Assignment of Error No. V, referring to Finding of Fact No. 7 (R. 142), the Court said:

“The failure of the western embankment at District No. 1 was the sole cause of damage to plaintiffs.

That embankment, a fill designed to carry railroads and owned and controlled by the railroad companies, had been adopted by both Districts Nos. 1 and 2 as one of the flood protective works. * * * ”

And in the third paragraph of Assignment of Error No. 1(a) (R. 128) the Court in its opinion said:

“ * * * that the western embankment owned and in control of the railroad be adopted by both Districts as an existing work * * * ” ,

These are copied from the Court's opinion and also assigned as error in our Assignment of Error No. 1(a). As has been shown, the ring levee, built to protect the underpass through the Denver Avenue Embankment, broke some thirty hours after the breaking of the western embankment of District No. 1, the railroad fill. At the time the damage was done to District No. 2 the breaking of the railroad fill and the flooding of District No. 1 was history. It made no difference whatever to the land-owners in District No. 2 whether District No. 1 was flooded by the breaking of the railroad fill or by cloud-burst or what-not. Peninsula Drainage District No. 1 had been flooded before the cause of action arose, the flooding of iDstrict No. 2. The entire issue in the case is whether Denver Avenue Embankment was protection for District No. 2 from waters coming from the west. There is nothing in the contentions of either party in the PTO and nothing in the evidence, either in the PTO or oral evidence, that would make an issue of the breaking of the railroad fill. There was no evidence submitted or offered in any way with reference to the cause of the

breaking of the railway fill, nor whether the United States was responsible for it.

Likewise there never was any evidence offered that District No. 2 adopted the railway fills as its western protection. There is no reference to the railway fills whatsoever in the organization of District 2 nor in the re-organization, and no evidence whatsoever to support findings that District No. 2 adopted this railway fill as protection on the west nor put any dependence in it whatsoever.

This finding of the Court it would seem stems from Note No. 7 on page 6 of the Court's opinion (R. 132), which reads as follows:

"The Plan for Reclamation adopted by District No. 2 recited that District No. 1 was protected 'by its west, north and south levees, connecting with system No. 2'. District No. 2 planned to construct levees on the east, north and south. The Plan concluded, 'It is apparent that this will affect a complete closure of the land included in this district against high water.' "

The plan for the organization of District No. 2 was set forth in the pleadings filed in the County Court and in the Court's order (Ex. 26, R. 302). In neither of these was there any mention made of the railway fills nor of Peninsula Drainage District No. 1 or its dikes. In the Court order, on the other hand, it is said (R. 332, 333):

"The said lands are partly protected from overflow by dikes upon or near the boundaries thereof, and the proposed plan will include such additional dikes and works as will be deemed necessary."

This statement follows the description of the area in which the Denver Avenue Embankment was given as the western boundary, that is, the eastern boundary of the 80 foot strip of ground deeded to the County by Peninsula Industrial Company. There was filed in this proceeding, however, a report by Phillip H. Dater, Engineer (Ex. 27, R. 334). In this report Mr. Dater said (R. 335):

“Attached to this report is a contour map, Plat 1, showing the physical characteristics of these lands included in District No. 2. The District has for its west boundary the Derby Street fill of the Interstate Bridge, which also constitutes the east boundary of Peninsula Drainage District No. 1 — this fill upon completion of District No. 2 will not act as a dike since District No. 1 will be reclaimed by its west, north and south levees, connecting with system No. 2. It will, however, constitute an additional element of security to Districts No. 1 and 2.”

Then after describing the north, south and east boundaries, some two or three paragraphs later, Mr. Dater said:

“It is apparent that this will affect a complete closure of the land included in this district against high water.”

It is very apparent that Mr. Dater's description of the area, concluding with his last statement, is referring to the western boundary as Denver Avenue Embankment and not the railroad fill and dikes around District No. 1. The reference to this embankment or fill not acting as a dike after the construction of the dikes around District No. 1 was entirely and clearly a parenthetical statement. What he said was entirely obvious. That is, that after District No. 1 constructed dikes on its north,

south and west there would be no water against the Denver Avenue Embankment. However, until that time it would act as a primary dike while thereafter it would act as a secondary dike. It seems to us there can be no misunderstanding of this Engineer's report but the Court has misconstrued it to give it an entirely different meaning, in that District No. 2 was adopting District No. 1's dikes and the railway fills as its western protection.

As a matter of fact District No. 1 never completed the dikes which Mr. Dater said were "to be built". They built dikes on the south and north but on the west they built no dikes or levees whatever as anticipated by Mr. Dater, but instead hooked on to railway fills over which they had no control whatsoever nor any right of improvement or maintenance and there was no contract with the railroad that its fill could be used as a dike or that the railroads would maintain it or that they could hook onto it. As a matter of fact these railway fills had never been subjected to side water pressure until the building of these dikes by District No. 1 (PTO R. 38). It would seem that the railroad company could have at any time forced the disconnection of these dikes so as to relieve the railway fills from this side pressure which they were not built to withstand.

If there could have been any doubt as to what District No. 2 was relying upon as its western boundary and protection, any and all such doubts would be completely dispelled by the reorganization of District No. 2, which took place in 1928 (PTO R. 25, 27). At that time the Supervisors of District No. 2 applied to the Probate De-

partment of the Circuit Court of Multnomah County which took over the jurisdiction of the County Court of Multnomah County under the Statutes of Oregon. By this petition it was recited that the Denver Avenue embankment had been built to a height of 33 feet (R. 26) whereas their outside dikes were only 28 feet. They recited that landowners in the District had applied to the Supervisors to increase the height of these outside dikes to 33 feet to match Denver Avenue Embankment. In this petition there was no mention made whatsoever of District No. 1 nor any of its dikes or the railway fills.

Following this petition and the order of the Court allowing the same, the landowners of the District were assessed \$25 per acre (PTO R. 27) for the expense and thereafter the District with the aid of the government built up the outside dikes to a minimum height of 33 feet, a maximum of 35 feet (PTO R. 21). During the same period the culvert through which Peninsula District No. 2 had temporarily drained its surface waters into No. 1 and there pumped them into Columbia Slough through a joint pumping plant was entirely plugged. It was plugged by the W.P.A. under government engineers' supervision (Ex. 66, p. 11; PTO R. 27). District No. 2 then drained its surface waters to the south side along Columbia Slough and pumped them over the dike at that point. From then on there could be no possible contention that District No. 2 had any dependence whatever on any of the works of District No. 1 nor that it did not look entirely to the Denver Avenue Embankment as its western protection regardless of how District No. 1 might be flooded.

We also want to call the Court's attention to the plat attached hereto as Appendix A. This plat shows the area making up Districts Nos. 1 and 2 and is a composite map made from "Exhibits Nos. 1 and 2" of the Districts separately. This map on the reduced scale is 1600 feet to 1 inch. By looking at this map it will be observed that without Denver Avenue Embankment there would never be any connection between the dikes around District No. 1 and District No. 2. In the first place there is an 80 foot strip of land between the two districts which was occupied by Denver Avenue. In the second place the south dike of District No. 1 meets Denver Avenue considerably north of the south dike of District No. 2. It follows that without the Denver Avenue Embankment there would have been no "circumvolution" of the area in District No. 2 by the dikes of the two districts, Nos. 1 and 2. Without the existence of the Denver Avenue Embankment neither of the districts would have had any protection whatever.

We also wish to call the Court's attention to the provision in the PTO (R. 29, 30) which said:

"West of the highway fill supporting Denver Avenue lies Peninsula Drainage District No. 1. The levees of that district provide protection for Peninsula Drainage District No. 2 *in the sense that in the absence of a failure of one or more of those levees flood waters can not approach Peninsula Drainage District No. 2 from the west.*" (Emphasis ours)

This provision of the PTO we believe negatives any idea that any dependence was put in the dikes of District No. 1 or the railroad fills except that it recognized that

so long as there was no break in those fills or dikes the Denver Avenue Embankment would not be subjected to water pressure.

In Assignment of Error No. VI, taken from Finding of Fact No. 8 (R. 142), it is said:

“ * * * No reliance was placed on Denver Avenue, and Denver Avenue is mentioned only casually as furnishing additional protection.”

We are unable to understand what the Court means by saying that the embankment was only “casually” mentioned. It was described in the organization papers, the petition and order, and in Mr. Dater’s report as the western boundary. At least as much emphasis was put on to the Denver Avenue Embankment as any other border of the District. The railroad fill on the other hand, which the Court has determined District No. 2 was relying on for western protection, was never mentioned at all in the proceedings at any time and the dikes around District No. 1 if they had been built, were only mentioned as preventing water from approaching the Denver Avenue Embankment until such time as such dikes failed.

In the reorganization proceeding the entire emphasis was put on the Denver Avenue Embankment when it was said that the embankment had been built to a height of 33 feet and it was desired to build the outside dikes to an equal height. And when that was followed by the plugging of the culvert through Denver Avenue being temporarily used for drainage purposes there could be no clearer showing that District No. 2 put its entire dependence upon the Denver Avenue Embankment. And

why shouldn't they, with the Denver Avenue Embankment being so much greater in strength than any other dike or embankment, with the County and Highway Commission having the obligation to maintain it, and with the necessity of maintaining it against high waters for the protection of its highway approach to the bridge.

In the fourth paragraph of Assignment of Error No. 1(a), in the Court's opinion (R. 132), we find the following:

"District No. 2 adopted the western embankment as one of its guards against overflow, as it did the other works which primarily defended District No. 1.⁷ This the District had a legal right to do under the statutes of the state.⁸ The breaking of the western embankment upon which these landowners relied for safety was the sole cause of disaster."

Approximately the same wording is carried further into Finding of Fact No. 3 (R. 140), our Assignment of Error No. 2.

The Court there said:

"This the District had the legal right to do under the Statutes of the State." Citing in Note 8 in the Opinion Oregon Laws 1915, Chapter 340, Sec. 29, ORS 547.315.

This Section cited by the Court provides a connection may be made by one district with the works of another but in order to do so a written consent must be obtained from the district or a court order procured. In this case there was no consent, there was no court order, and there was no intent, actual or implied, to adopt any of the dikes or works of District No. 1 when District No. 2 was organized nor in its organization.

In addition to that the railway fills upon which the Court determined District No. 2 relied were from one to two miles west of District No. 2, were never any part of the dikes of District No. 1, and District No. 1 could not have given any consent nor could any court order have provided that District No. 2 could rely upon such railway fills. These fills were entirely within the control of the railway company. District No. 1 had no right to maintain, improve, repair the same, nor to rely upon nor to hook onto them. The evidence shows that they are merely hooked on to these railway fills with their north and south dikes without any right to do so whatsoever and without any right to rely upon the railroads to maintain them, and no right to depend upon them (PTO R. 40). District No. 1 apparently considered that for this small area of swampland it was better to take the risk of the railroad company's fills being sufficient for their protection rather than to go to the enormous expense of building a long dike along the west side. This undoubtedly accounts for the fact that District No. 1 remained largely a swampland until taken over by the government for the temporary housing project. It is shown in the opinion in *Clark vs. U. S.* 109 Fed. Sup. 213, at p. 222, that the government owned approximately 80% of the entire district. The strength and efficiency of the Denver Avenue Embankment, however, and the obligation of the county and state to maintain the same likewise accounts for the reason that District No. 2 was almost, if not entirely and completely developed and improved.

So far as counsel are able to determine the above are the factual findings upon which the District Court announced the new theory that

"THE FAILURE OF THE WESTERN EMBANKMENT AT DISTRICT NO. 1 WAS THE SOLE CAUSE OF DAMAGE TO PLAINTIFFS."

We believe we have shown that none of these findings are supported by the evidence. In fact that they are contradicted by the agreed evidence.

As it appears to us the only assumption upon which this theory could be made would be the assumption that Denver Avenue Embankment had been destroyed by the wrongful act of F.P.H.A. and a flooding of District No. 1 would necessarily flood No. 2. But when you make this assumption you admit the plaintiff's entire case.

The only inkling we can get as to why the District Court adopted the theory that the breaking of the western embankment, the railway fill, was the cause of the disaster and the questions involved in these cases were identical, is that the Court wrote a very exhaustive opinion, in fact two opinions, on the Vanport cases involving the damage to residents in District No. 1. These opinions reflect a very exhaustive study of the facts involved in those cases. In that case the breaking of the western embankment, the railway fill, was the principal and practically the only issue involved. It seems to counsel that in writing the opinion in these cases the Court has confused the issues with the Vanport cases and adopted the same issue. This made it necessary to eliminate Denver Avenue Embankment completely one way or another,

and this has been done by findings of fact that are entirely contradictory to the PTO.

So far as we can see there is not the slightest similarity between the issues involved in the Vanport cases and in these cases. In fact the District Court itself recognized this in the Vanport case. We call the Court's attention to the case of *Clark vs. United States*, reported in 109 Fed. Sup. at page 220, in which the Court said, and we quote:

"So an attempt has been made by each plaintiff to show that the United States, in some of its manifestations, was under duty to maintain the embankments surrounding Vanport. The ground should be cleared first. *Denver Avenue fill broke after Vanport was flooded, so no causal connection between that incident and any property damage here complained of can be established.* * * * The remaining embankment was not constructed, owned or maintained by the United States. This fill had been made by two railroads at various times, not as a water repellent structure, but for the purpose of carrying trains in regular course of operation." (Emphasis ours)

So it would seem that the Court itself recognized that there was "no causal connection" between the issues in the two districts. However, the opinion in these cases apparently recognizes no difference.

In the same paragraph and in the same case as just above quoted, the District Court said in referring to this identical railway fill,

"This fill had been made by two railroads at various times, not as a water repellent structure but for the purpose of carrying trains in the regular course of operation."

So in the Clark case the District Court held that this railway fill or western embankment was nothing but a railway fill designed to carry trains and not a dike, whereas in the instant case it has apparently held that it was a dike adopted by both Districts Nos. 1 and 2.

This is only one more of many inconsistencies, contradictions, and unsupported statements of fact upon which the Court adopted its new theory which was never thought of by either the appellants or the appellee and never presented. The appellants submit that they are entitled to a determination of this case upon the theories and issues presented by them.

Item 2. THE COURT FOUND THAT:

Denver Avenue embankment was not designed to repel a wall of water equal to the 1948 flood, whereas it was built as a bridge approach to withstand any high water and was adopted by the appellee to withstand a wall of water 4 feet in excess of the 1948 flood.

In Assignment of Error No. I(b), paragraph 4, (R. 130) the Court said:

“But no one contemplated Denver Avenue as a bulwark against the weight of water such as was cast against it when the western embankment broke.”

This is repeated in Assignment of Error No. VII.

In Assignment of Error No. VI we find the following:

“Denver Avenue, the boundary between the two districts, was not intended to be a levee and was not designed as a water-repellent wall or structure.”

In this contention the Court contradicts itself both in the opinion and in the findings of fact, and it is also contradicted by the government's expert witnesses, Mr. Middlebrook and Mr. Turnbull.

In Finding of Fact No. 5 (R 141) it is said:

"The purpose of this ring levee was to afford some protection to District No. 1 from overflow by flood water from the east if the dikes of District No. 2 (which were lower than those of District No. 1) were overtopped."

Approximately the same language is found in the Court's opinion. Mr. Middlebrook and Mr. Turnbull testified the purpose of the ring dike was to protect District No. 1 from overtopping of the dikes surrounding District No. 2 because those dikes were built to a height of 33 feet or 1.7 feet lower than the dikes around No. 1 (R. 225 and 239). The ring dike was only a link in the protection afforded by the Denver Avenue embankment and under the theory of these experts the ring dike would have been no value whatever unless the balance of the Denver embankment was sufficient to withstand a wall of water of 33 feet and above that to the height of the ring dike of 34.7 feet. This would be about 3 feet higher wall of water than was experienced in 1948. It follows that if the ring dike was built for the purpose for which these experts testified, and the purpose stated by the Court in its opinion and findings, that it had to be anticipated that the Denver Avenue embankment was sufficiently water repellent to withstand a wall of water much higher than was experienced in 1948.

We also want to call the Court's attention to the purpose for which the Denver Avenue fill was constructed. It will be remembered that it was constructed for a highway to approach the bridge and was built over ground that was subjected to certain annual high waters and to more or less regular heavy floods. It was intended to be and was constructed as one unbroken, continuous embankment running across this low ground. It was built to a considerable height prior to the organization of either District No. 1 or District No. 2, and prior to the dikes being built around either District (PTO R. 22). Under these circumstances this embankment necessarily had to be built to a height that would top any anticipated flood waters and be sufficient in strength to repel the same. Otherwise the embankment and the highway would have gone out annually with every high water. Besides the contract with the landowners required construction to "as far as possible duplicate" the bridge approach to the Columbia River bridge (PTO R. 23). The Court we believe will recognize that a bridge approach would be worthless if it was not water repellent. If it was not so built it would be a violation of the contract by the County. However, if the Court will refer to Item 4 herein for the comparison of dikes it will readily be seen that this embankment was over three times the size of the largest section of any of the outside primary dikes and built in the same manner and of the same materials. Also, it will be seen that it was nearly twice the size of the section of the railway which gave way and of better materials and better construction. Yet the Court found

that District No. 2 relied on the railway fill, a mile or so outside the district and over which it had no control or rights, and not on Denver Avenue embankment on its border which was nearly twice the size and strength and for which it had a written easement.

Finally the Denver Avenue embankment did stand up against this wall of water in the 1948 flood which the Court said it was not intended to do.

But even if this embankment had not been sufficient to withstand the wall of water produced by the 1948 flood which it did; even if it had not had the strength to protect the United States dollar investment against a wall of water up to 34.7 feet as was anticipated by the appellee's expert witnesses; even if the Court had been right in anticipating the embankment to be sufficient to withstand a wall of water up to 34.7 feet if coming from the east upstream with the force of a heavy current behind it but not sufficient to stand up against a wall of back-water up to 31 feet coming from the west, downstream; even so, regardless of its strength and efficiency, District No. 2 landowners owned a portion of the embankment and had a written easement to make use of the entire embankment and were entitled to whatever protection it might afford.

It seems nothing less than absurd to the appellants that this decision would be based on such inconsistency.

In *U. S. vs. Florea*, 68 Fed. Sup. 367, at p. 374, the Court said:

“Neither private individuals nor government agents could escape notice of the fact that these lands would be of no value without diking protection.”

So far we have not called the Court's attention to the testimony of any of the expert witnesses except the government's witnesses. We do, however, wish to call the Court's attention to the testimony of Mr. F. R. Schanck (T. R. 165 and 256 and pages following) and to Mr. Felix Zeidlack (T. R. 204 and pages following). These were both well qualified engineers. They both testified that the Denver Avenue embankment was sufficient to withstand the sudden flood up to its full height of 37.6 feet. They both testified that the ring dike was inadequate and Mr. Schanck testified that the ring dike was not sufficient to stand up against a much lower water than was experienced. This testimony is undisputed. The government engineers' testimony showed that they anticipated that the embankment was sufficient to withstand a flood up to a height of their ring dike of 34.7 feet.

Item 3. THE COURT FOUND THAT:

No one anticipated the breaking of the railway fill although the appellants did and had provided against it.

In paragraph 9 of the findings of fact (R. 143) set forth in our Assignment of Error No. VII, it is said:

“In the exercise of due care, there was no reason to anticipate a failure of the western embankment or any embankment of District No. 1, and hence no reason to anticipate that flood waters would ever approach Denver Avenue and the ring levee from the west. * * * The failure of the ring levee and the

inundation of the plaintiffs' property resulted from a set of circumstances unforeseen by anyone, including plaintiffs, and which in the exercise of due care could not have been foreseen."

No evidence was introduced by any one having knowledge of the railway fills as to whether a breakage there might be anticipated. That issue was not in the case. The issue was entirely as to whether District No. 2 had the right to rely on the Denver Avenue embankment and whether that protection was wrongfully destroyed. Undoubtedly thousands of witnesses could have been subpoenaed and asked the question, whether they had any reason to anticipate a breaking of the railway fill and whose answers would necessarily be "no" because they had no information in reference to it. This is a far cry from the statement that there was no reason to anticipate a breakage and that it could not be foreseen.

As appellants see it, it would make no difference in any event whether such a breakage could have been foreseen or anticipated. If the landowners in the District provide themselves a secondary dike for their protection regardless of how strong the dikes around the adjoining districts may be, or whatever protection they might have, they are entitled to maintain that protection. A third party could gain no right to cut that protection and destroy it merely because that third party did not anticipate the breakage of dikes in the adjoining districts, nor would it make any difference how many people could not foresee a breakage of these dikes.

However, the original owners of this property and their successors certainly anticipated that there could be such a break and all during the years the Denver Avenue embankment was preserved and maintained to protect them against any emergency. Evidently the landowners of District No. 1 also anticipated that there could be such a break, as must be inferred from the fact that this District was never developed, at least the major portion of it, until the appellee constructed its housing project. They well should have anticipated such a possibility by reason that the District had no control whatsoever over this railway embankment and no right to repair, maintain or strengthen it or to hook on to it, and the railroad companies having the control of it had no obligation whatsoever to maintain it for the protection of District No. 1, as was the case with the County and the Highway Commission as to the Denver Avenue embankment. Engineer Schanck (T. R. 256) testified that the Denver Avenue embankment was "very much more effective" than the railroad fills.

The forethought of the landowners in District No. 2 to guard against the breaking of dikes in adjoining districts were fully and well justified by the finding of government engineer Diblee in his flood or completion report (Ex. 66; R. 445) in which he recommends many things that should be done to secondary as well as primary dikes to guard against future floods, including the elimination of this underpass through Denver Avenue embankment. No one can read Mr. Diblee's report without recognizing that there may always be anticipated a break in either a primary dike or secondary dike, re-

gardless of its strength and efficiency. Also that every feasible guard should be made against such a break and no guards should be removed or destroyed.

What possible right could the appellee gain to destroy District No. 2's dike simply because it or anybody or any number of people had no reason to anticipate the breaking of the railway fill in the adjoining District?

Item 4. THE COURT FOUND THAT:

District No. 2 made no effort to strengthen Denver Avenue embankment although it was more than three times the size of any primary dike and the County and Highway Commission had a written obligation to and did maintain it.

COMPARISON OF DIKES

The Court in its opinion and in our Assignment of Error VI (R. 142) said:

“Neither District No. 1 nor District No. 2 ever spent time or money in attempting to strengthen Denver Avenue.”

It will be remembered that the landowners in this area conveyed the right of way to the County in consideration of the County and its successors maintaining the fill and embankment. There is no showing as to the value of this land but if it had been protected on both the east and west as is maintained by the Court's opinion, this land would have been of very considerable value. There was set aside for highway and for the toes of the fill a strip of ground 317.6 feet in width and a mile or two in length. This made a very considerable consideration for the maintenance of the fill by the

County and its successor, the Highway Commission, especially as it had to be maintained in any event.

Now as to the failure of the diking districts to do anything to strengthen this embankment or to request the government to do so. It would seem proper here to make a comparison of this embankment with the outside and primary dikes and the S. P. & S. Railway fill, as follows:

Dikes	Base Width	Crown Width	Height	Side Slope	Original Construction
over Ave. embankment (O R. 22)	317.6'	92'	37.6'	1' on 3'	Dredged
th Levee (O R. 21)	90' to 100'	12' when no road. 20' to 30' with road on top	33' to 35'	1' on 2' riverward 1' on 3' and 1' on 4' landward	Dredged
th Dike on to over (O R. 21)	70'	12'	33' to 35'	1' on 2'	Dredged
t of Union (O R. 21)	100'	12'	33' to 35'	1' on 3'	Dredged
t Levee (O R. 21)	100'	12'	33' to 35'	1' on 2' riverward 1' on 3' landward	Dredged
g Dike (O R. 50)	100'	12' to 7.5'	34.9'	1' on 2' and 1' on 1½'	Dry sand
way Fill (O R. 58)	172'	32'	46.37'	1' on 1¾'	Dry sand

The above tabulation shows the original construction. Subsequently the government improved a part only of the outside dikes and used clay and silt from

borrow pits (PTO R. 21). The ring levee was subsequently improved by placing a three foot clay embankment on the east side only to protect against water from the east only (PTO R. 52). The Denver Avenue embankment was built only to 33 feet by 1928 which is shown in the reorganization of District No. 2 (PTO R. 26). Thereafter the height was raised by the State Highway Commission to 37.6 feet but there is no showing as to what materials were used (PTO R. 22). It will be noticed that the only two embankments which washed out in the flood, the railway fill and the ring dike, were the only ones built from dry sand.

Now let us make some comparisons of these dikes as follows:

First: Let us compare Denver Avenue embankment with the north levee, that being the strongest dike in construction, the largest in size with a road over the top, and on the Columbia River side subjected to the greatest hazard. This comparison shows that the Denver Avenue embankment was 3.176 times larger in base width than the north embankment at its widest point. It shows the Denver Avenue embankment was in excess of three times the crown width of this north embankment at its widest point. The original construction was the same, being dredged from the river or slough.

This comparison shows that it would have been nonsense and useless for District No. 2 to have requested the strengthening of the Denver Avenue embankment or to undertake it themselves. They had a contract with the County and the Highway Commission

to maintain this embankment and it was well done. It was built to maintain the bridge approach over swampland that was subject to being overflowed and necessarily sufficient in height and sufficient in strength to withstand any anticipated flood and it gave far greater protection than any outside dike.

Second: Now compare the Denver Avenue embankment with the railroad fill which washed out. Here the Denver Avenue embankment was almost twice the width at the base as the railway fill and almost three times the width at the top. It had side slopes almost double. The railroad embankment was subject to heavy traffic by the railroad companies. The Denver Avenue was subjected to heavy traffic by highway. The Denver Avenue embankment was dredged whereas the railroad embankment was made from dry sand over piling. The County and Highway Commission were under contract to maintain the embankment and it was expected to be subject to side water pressure. When the railway fill was built it was not subject to side pressure (PTO R. 38) and neither District had the right to so subject it.

Third: Now compare the ring dike with the outside dikes around District No. 2. The ring dike was shown to be 100 feet at the base. The outside dikes 100 feet with the exception of a part of the south dike which was only 70 feet. The crown width was 12 feet on all outside dikes with the exception of the north dike on Columbia River which was from 20 to 30 feet. The ring dike was 12 feet. This comparison in size makes

it very obvious why the landowners in District No. 2 assumed that the ring dike was sufficient for their protection as it was about the same size. The difficulty, however, was that there were many hidden defects in the ring dike which could not be observed by a layman and could only be determined by an engineer after thorough investigation. These hidden defects were as follows:

(1) The ring dike was built of day sand (PTO R. 50).

(2) There was a clay bank placed on the east side for the protection against water coming from the east only, whereas no similar protection was given for its west side to protect from water coming from the west (PTO R. 52).

(3) A concealed culvert was run under and through this ring dike for the purpose of draining water from west to east from Peninsula Drainage District No. 1 to Peninsula Drainage District No. 2. There was a floodgate on the east side to prevent water entering this culvert from the east but there was no similar floodgate on the west to prevent water from running from west to east (PTO R. 52, 53). It was this culvert that probably started the washing out of this ring dike (Ex. 66, quoted in Statement).

(4) There was a water pipe run through this ring dike of considerable size (Ex. 66, quotation in Statement).

(5) Cracks and sloughs appeared in this ring dike

which the Housing Authority employees covered over so they could not be seen by the ordinary observer (PTO R. 54, Tr. R. 200, Ex. 32 R. 364). However, at the time of the flood this crack apparently showed up (Ex. 66, R. 449).

This comparison it seems to us shows very clearly why no greater fuss was created by the landowners in District No. 2 during the period between the building of the ring dike and the flood, there being nothing which they could observe to indicate that the ring dike was not built for their protection.

Fourth: Now compare the Denver Avenue embankment with the ring dike which was built at the same spot and the same elevation. The Denver Avenue embankment is shown to be 3.176 times in width at the base than the ring dike. Denver Avenue is shown to be $7\frac{1}{2}$ times in crown width as the ring dike at its widest point. The Denver Avenue embankment has slopes of 1 and 3 as against 1 on $1\frac{1}{2}$. The Denver Avenue embankment was dredged, whereas the ring dike was made of dry sand. The Denver Avenue embankment was necessarily built to withstand side water pressure from either side, whereas the ring dike was built to withstand pressure only from the east side. The ring dike was also subject to the many hidden defects above mentioned.

The Statutes of the State of Oregon, Sec. 123-216, O.C.L.A., ORS 551.140, required the appellee to afford equal protection to District No. 2 when it cut the underpass.

So it clearly appears that the Denver Avenue embankment was a "monster" when compared to any dikes in the District. Yet the Court held that it was entirely worthless except for the protection of the appellee's investment against the overtopping or breaking of the outside dikes to the east.

Item 5. THE COURT FOUND THAT:

Dependence on Denver Avenue embankment was an after-thought, although appellants had anticipated its need 33 years before the flood and had provided for it to always be maintained and had always relied upon it.

The Court, on page 3 of its opinion (R. 130) set forth in Assignment of Error No. 1(b) said (Paragraph 3):

"This is a case of after-thought, not forethought, on the part of plaintiffs and District No. 2."

Just how the Court could arrive at this conclusion is hard to conceive. It seems to the appellants that there could hardly be a case where more forethought was shown by the original owners of this property. It will be remembered that the deed given by Peninsula Industrial Company to the County was given about two and one-half years before the organization of either District No. 1 or District No. 2, at a time when the property was unprotected by dikes. The highway was constructed but not to its ultimate height during that period. The Peninsula Industrial Company foresaw at that time, thirty-three years before the flood, that if an embankment duplicating the bridge approach and unbroken was built across this swamp land it would

necessarily have to be sufficient in height to top any of the annual floods which might be anticipated and which were always certain to come. Also, that it would have to be built, as bridge approaches usually are, to withstand the water pressure, otherwise the highway would have been washed out annually. The Peninsula Industrial Company foresaw that this sort of an embankment with a highway over it carrying heavy traffic continually and with it having to be maintained by the County and its successors that it would make an excellent protection against flood water. They had the foresight to provide just such an embankment and their right to use it. It was thereafter continually maintained until destroyed by the cutting of the underpass by the government and was continually used for flood protection.

There is no evidence whatever that would justify any conclusion that the right of the landowners to rely upon this embankment as a western protection was an afterthought.

Item 6. THE COURT FOUND THAT:

No objections were made to the cutting of the underpass, although appellee gave no notice of intention to cut same and strenuous objections were made to the Highway Commission against it.

In Assignment of Error No. III, referring to Finding of Fact No. 4, (R. 141) we find this statement:

“No protest against construction of the underpass was made by District No. 2. A resolution mildly suggesting objections to the construction of the underpass without a stop-log structure was passed

by its board of directors, but it seems never to have been called to the attention of anyone outside that group."

Just what rights the government could obtain to cut an underpass through Denver Avenue embankment thus destroying the protection of District No. 2 by reason of it not being objected to, it is not explained, although counsel for appellee seem to make quite a point of it. Examining the facts, however, we find there is no justification for this finding. So far as the F.P.H.A. was concerned no notice whatever was given to District No. 2 or either District of any intention to cut any such underpass, nor any opportunity for them to object. They began cutting this underpass under contract on the 2nd day of November, 1942, ten days before they procured a permit from the State Highway Commission (PTO R. 49). So far as the F.P.H.A. is concerned their action was another Pearl Harbor. They simply started cutting the underpass without any authority or negotiations whatsoever with the District.

On October 26, 1942, at the annual meeting of the landowners of Peninsula Drainage District No. 2, we find in their minutes (Ex. No. 29 R. 341) the following:

"Considerable discussion ensued concerning the underpass between Kaiserville and Peninsula Drainage District Number One and our District. It was decided that the Union Avenue right-of-way has no connection with our district and it is up to the United States Engineers and the State Highway Commission to adjudicate any differences concerning the effect on the drainage by the construction of this underpass."

The minutes of the meeting of the Board of Supervisors of District No. 2 under date of November 2, 1942 (Ex. No. 30, R. 343) reveal the following action taken by the body:

“Considerable discussion ensued concerning the underpass at Kaiserville on Denver Avenue. It was decided that our attorney Mr. Phipps write a letter to the Oregon State Highway Commission to see if this matter could not be rectified so that our drainage system would not be disrupted.”

At the special meeting of the Board of Supervisors of April 19, 1943, we find the following (Ex. No. 31, R. 343):

“It was suggested that the Secretary also write the Oregon State Highway Commission and the U.S. Engineers, advising them that the underpass on Denver Avenue, at Vanport, may cause trouble in case of a flood by dividing Districts #1 and #2, and that Denver Avenue serves as a dyke between the two Districts. The Board of Directors feel that a stop-log should be erected on this underpass.”

Mr. Phipps in his testimony (Ex. No. 35) testified that he contacted Mr. Baldock of the State Highway Commission, he being at that time the President of District No. 1, as well as attorney for District No. 2. Mr. Phipp's testimony shows that he struggled with the Chief Engineer of the Highway Commission, Mr. Baldock (Ex. 35, R. 427, 429), complaining about the underpass but that Mr. Baldock arbitrarily refused to recognize that the District had any rights in the embankment. Mr. Phipps in this testimony (Ex. 35, R. 427) said:

"I took it up with the State Highway Department. I made objections, both orally and in writing, to the Highway Department with reference to the underpass. I maintained the Highway Department had no right to cut a hole in our dike, and I always understood that Denver Avenue was one of the dikes of the District."

Mr. Baldock in his testimony (TR. R. 251, 255), acknowledged that Mr. Phipps had complained. He acknowledged that he knew that both Districts claimed the Denver Avenue embankment as a dike but denied that they had any right to do so. At the same time he admitted that he had not seen the agreement contained in the deed by which the County acquired the highway, that is, the deed giving the Districts the right to use the Denver Avenue embankment. Mr. Baldock tried to hedge somewhat about the claims of District No. 2, but it must be remembered at that time the damage had been done; that no one in District No. 1 had any claim to the failure of the Denver Avenue embankment because the water came from the west, whereas the landowners in District No. 2 were at that time making claims for damages.

The evidence shows that there was no action that could have been taken and no objection that could have been made on behalf of District No. 2 to prevent the construction of the underpass short of a suit to enjoin. Also, that the construction was started and completed so rapidly that there was little time for such an action. The evidence also shows that the F.P.H.A. started building the ring dike almost immediately. It must be inferred from this that the landowners in Dist-

dict No. 2 assumed that this dike was being built for the protection of both Districts, particularly since the statutes placed that duty upon the one cutting the underpass. It is well settled law in the State of Oregon that inferences of this nature are sound evidence, *Donis vs. Sawyer's Service Inc.*, 143 Or. 433. So it would seem that the appellee has nothing to rely upon or support this contention, and in any event no rights could be obtained to do something unlawful and wrongful merely by failure of the affected party to object.

Item 7. THE COURT FOUND THAT:

The appellee owed a duty to protect against the underpass but owed no such duty because the appellants failed to protect against it themselves after the appellee had wrongfully cut it.

On the seventh page of the Court's opinion (R. 134) set forth in the sixth paragraph of Assignment of Error No. 1(b), the Court said:

"It is true that one who destroys a dike against flood waters would be liable for damage proximately caused thereby. But for six years after the underpass was cut and the ring levee constructed, the Drainage District, which had the continuous duty of maintenance, strengthening and repair, did not do anything with either Denver Avenue or the western embankment. * * *"

And in the seventh paragraph of Assignment of Error No. 1(b), the Court in its opinion said (R. 137):

"Here, the United States is not liable. The government owed no duty to these landowners."

In Assignment of Error No. VI, the Court said in its Finding No. 8 (R. 143):

“Neither Multnomah County, the State of Oregon, the United States nor anyone else has or had any obligation to maintain Denver Avenue for flood protection purposes.”

And in Assignment of Error No. VIII, referring to Finding No. 10 (R. 144), it is said:

“District No. 2 and not the United States had the duty of providing flood protection for lands within the District. District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands.”

And in Assignment of Error No. XIII, referring to Finding No. 16 (R. 146), the Court said:

“The United States has proved facts sufficient to establish that it had no duty to protect plaintiffs or their property, that nothing done or left undone by the United States or its employees constituted a violation of any right of plaintiffs, and that there is no proof of any wrongful act or omission on the part of the United States or its employees.”

No mention whatever is made of the Statutes of the State of Oregon which provided for such duty (Section 123-216 O.C.L.A., ORS 551.140). No attempt is made either by the appellee or the Court's opinion or its Findings to answer this provision of the Statute except by ignoring it. This Section as found in O.C.L.A. refers to irrigation districts but is made applicable to Drainage Districts by Section 123-206. This section of law is quoted in the Statement of the Case but it is short, and for the convenience of the Court is here copied again:

“REALIGNMENT OF DIKES BY LAND-OWNER: PROCEDURE: EXPENSE: OWNERSHIP OF NEW DIKE. Any person through whose lands dikes shall have been constructed under this act may be allowed to construct a dike upon new lines between any two points on the original line. In such case the owner shall file application with the county court, giving a plat of the proposed change, and indorsed by the superintendent of the district. If the court is satisfied that the change is not detrimental to the district, the application shall be granted. The applicant shall construct the new dike at his own expense, and up to the standard of the original, of which fact the superintendent shall be the judge. The dike thus constructed shall become the property of the district in the same manner as the original, and subject to the same regulation, and the right of way of the original dike thereon becomes vacated.”

In addition to this section of the statute making it incumbent upon one cutting the dike to provide substitute and equivalent protection, the Court, it seems to us, contradicts itself when it said, on page 7 of its opinion (R. 134), as follows:

“It is true that one who destroys a dike against flood waters would be liable for damage caused thereby.”

Thus the Court seems to adopt the strange theory that while the United States would be liable for damages for having destroyed the dike (the Denver Avenue embankment) it had no such liability because the appellants themselves did nothing to protect it. This, in spite of the fact that the government had made it impossible for the landowners themselves to protect against the underpass by taking all of the ground on

the east side thereof on which a ring dike could be constructed. The alternative thereto, as suggested by the Court, being the condemnation of the railway fill and reconstruction thereof. That would require the foresight to determine where the break would occur. A difficult undertaking.

The right designed to protect against interference with dikes was discussed in *Loveless vs. Ruffcorn*, 143 Iowa 221, 121 N.W. 1034, wherein the Court said:

“In the spring of 1858 certain legal proceedings were had before the County Judge of Harrison County under a statute then in force providing for the construction of the levee in question for the general purpose above indicated. By such proceedings a highway was also established along the line of the levee in question; the embankment of the levee being also the traveled grade of the highway. In pursuance of such proceedings the levee in question was constructed, and has always been known as the “noyes Levee.” Its north end began at the north line of the land now owned by appellant, at some distance west of his northeast corner, and extended in a southerly direction, bearing slightly to the west for a distance of one mile and a quarter. Its southern terminus was therefore a quarter of a mile south of the south line of the land now owned by the appellant. The embankment was constructed to a height of two feet, and without any opening of its full length, and it has been so maintained for the 50 years. It has always been effective for the purpose of its construction, and has always protected the land on either side from the overflow of water. That it has always been accepted and acquiesced in by the several owners of the land contained in the tract is without substantial dispute. That such long acquiescence in such levee as a part of the drainage scheme of the

locality is effective to confer rights upon land-owners protected thereby is settled by our previous decisions. * * * Whether the tile drain so laid would have the effect of transferring flood waters from one side to the other we have no occasion now to consider. From the evidence in this record it would be very difficult to reach a satisfactory conclusion. Appellant has no legal right to cut the levee, even temporarily, and thus endanger the property of his neighbors. He suggests no method, nor purpose on his part, to lay such tile without cutting the levee."

We wish to call the Court's attention to Contention No. 23 of the appellee set forth in PTO (R. 96, 97):

"That the law regards flood waters as a common enemy against which each person is entitled to protect himself as and to the extent he sees fit and with no obligation to protect any other person; that the ring levee adjacent to the Denver Avenue underpass was intended to protect the Vanport residents and the \$25,000,000 investment of the United States in Vanport in the event that the primary levees of Peninsula Drainage District No. 2, which were lower than those of Peninsula Drainage No. 1, were overtopped by flood waters; that plaintiff, although he had no rights in connection with the construction or maintenance of the ring levee, was greatly benefited by its existence."

We agree with this statement of the law to the effect that any person has the right to protect himself against flood as and to the extent he sees fit. He may do so, of course, so long as he does not harm others by his acts. Also, he would owe no duty to a third party to make his protection benefit that third party, unless, as in this case, he owed a duty to that third party for some other reason, such as destroying of the Denver Avenue embankment in this case. It follows, also, that if one party

provides such protection for himself to such an extent as he sees fit, no third party would have the right to destroy that protection by cutting underpasses through it or otherwise.

This contention on the part of the appellee seems to set forth just the law that the appellants are contending for. Appellee has attempted no explanation as to why the appellants did not have the same rights as the appellee to provide for themselves such protection against floods as they see fit and to such an extent as they might see fit. In this case the appellants had provided themselves with the protection afforded by Denver Avenue embankment. Under the appellee's contention above set forth, as well as under the appellant's theory of the case, the appellants had a perfect right to provide this protection for themselves. It follows that the appellee would have no right to destroy that protection.

In this case it will be remembered that the appellee completely destroyed the protection provided by the appellants for themselves and adopted that same protection for their own exclusive use to protect their own dollar investment. We can see no reason why the same legal rights would not apply to the appellants as well as to the appellee. Neither can we see that it would make any difference whether the embankment was built or maintained or sufficient for a dike so long as the appellants had the right to rely on it.

Item 8. THE COURT FOUND THAT:

District No. 2 had no right to use the Denver Avenue embankment although it had an easement therefor, but F.P.H.A. had the right to destroy that easement and to appropriate the embankment for its own exclusive use without any such easement or agreement therefor.

Attempts were made in the findings to prove that District No. 2 had no right to rely on the Denver Avenue Fill. These seem to stem from the quotation of the lower court appearing in Note No. 10 at the bottom of page 6 of the Court's opinion (R. 133, 134) set forth in Assignment of Error I(b). In this note the Court quotes from the deed given by Peninsula Industrial Company to the County of Multnomah conveying the right of way. The Court quotes from that as follows:

" * * * This conveyance is made upon the following express conditions: * * * (a) * * * Multnomah County shall * * * construct * * * a fill and embankment * * * and shall * * * provide and thereafter maintain a public highway [thereon] * * *."

Here again the words taken from the provisions of the deed are accurate but by leaving out the meat of that provision the quotation emasculates the agreement. The provision of the deed from which these words were taken read as follows:

"(a) That said *Multnomah County* shall within three years (3) from the date of this conveyance *construct* or cause to be constructed, and thereafter maintain upon that part of the tract of land hereinafter described as Parcel B, which is north of the north bank of Columbia Slough, *a fill and embankment* which shall as far as possible duplicate the fill and embankment to be constructed by said Multnomah County upon Parcel A as des-

cribed herein, the west side line of the crown of said fill or embankment to coincide substantially with the west side line of said Parcel B *and shall* within said period *provide and thereafter maintain a public highway* over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereove * * *."

(We have emphasized the works taken from this and quoted by the Court above.)

It is readily seen from this that the agreement was to within three years construct and thereafter maintain an embankment which, by other parts of the deed, the grantors had the right to use. The grantors were not interested particularly in a highway but were willing to grant the right of way on condition that the County would construct its roadway upon an embankment, not a trestle, that it would do so within a period of three years, and after that it would thereafter maintain the same. No arguments should be necessary to show that the Court's interpretation of this contract is contradicted by the PTO.

It will also be remembered that the same deed provided for mutual easements. The County owned only an 80 foot strip, whereas the Highway and the embankment had a width of 317.6 feet at the base, the toe of the fill being upon private owned property. It remained as private property until that portion of it upon which the ring dike was built was taken over by the government for the purpose of building the ring dike. Even though the title to this portion of it would be in the government, it would still remain private property for

the purpose of this proceeding. This would leave 118.8 feet on either side of the fill on private property and within the District, with the easement to use the entire fill. When the government took over this property for the purpose of building this ring dike it expressly took it subject to the District's easement (Ex. 78, R. 471).

It shouldn't be necessary to go into the question of the rights of the abutting owners to highways in view of this specific agreement, this easement and this privately owned portion of the fill. However, even without any of this it is the contention of the plaintiff that the abutting owners would have the right to depend upon this embankment for any purpose not inconsistent with its use as a highway *thereover*. We do wish, however, to call the Court's attention to the statement of the law on this point, set forth in 125 Am. Jur. p. 432, Sec. 135, which is as follows:

"Where the fee is in the abutting owner, his title is not a contingent interest or a mere expectancy, but is a present subsisting ownership of the fee. He has full dominion and control over the land, and all the rights of an absolute owner of the soil, subject only to the easement and servitude in favor of the public. He may use the land for his own purposes in any way not inconsistent with the public easement, and is entitled to all profit and advantage which may be derived therefrom. But his right in the street or highway as a highway in so far as respects the right of passage and travel *thereover* is simply equal to and in no sense greater than that of the general public."

Many cases are cited by this authority in support of this, but since in this case the appellants had in addi-

tion a specific agreement to make use of the fill further citations should seem to be unnecessary.

The Court seemed to take the position that District No. 2 had no right to use Denver Avenue embankment although it had an easement therefor with a contract providing it should be maintained. But on the other hand, the F.P.H.A. had the right to destroy this easement and the protection afforded to District No. 2 and to appropriate the embankment for its own exclusive protection. And this without any contract.

Item 9. THE COURT FOUND THAT:

The appellants failed to protect against the underpass by construction of dikes themselves, whereas the appellee had made that impossible. The ring dike as built afforded District No. 2 some protection, whereas it was only a concealed trap.

In Finding No. 4 (R. 141), Assignment of Error No. III, the Court said:

“For the convenience of persons living in both districts an underpass through Denver Avenue Fill was built with federal funds.”

There is no evidence whatever that this was built for the convenience of District No. 2. The circumstances contradict this statement. There was no way of passage through this underpass from one district to the other because it was blocked off by the ring levee built for their own protection. Therefore, there was no possible use which District No. 2 could make of this underpass and no possible grounds upon which it can be said it was built for the convenience of District No. 2.

In the Court's opinion (R. 128) Assignment of Error I(b), third paragraph, the Court said:

"However, upon protest of District No. 1, a ring levee was built."

This is refuted in the Contentions of the United States, Contention No. 23 (PTO R. 96), where it is said:

"That the ring levee adjacent to Denver Avenue Underpass was intended to protect the Vanport residents and the \$25,000,000 investment of the United States in Vanport * * *."

It is also contradicted by the evidence of Mr. Phipps (Ex. 35, R. 429), wherein Mr. Phipps testified that he objected strenuously to the Highway Commission as to the construction of the underpass. At that time he was the President of the Board of Supervisors of District No. 1 and he was also attorney for District No. 2. He objected to the construction of any underpass without adequate protection equivalent to the highway embankment. The United States at that time owned the major portion of District No. 1 upon which it constructed its housing project. However, the underpass was entirely built for the interests of the government and protection which it gave to the balance of District No. 1 was only incidental, and the construction of the underpass was made over their protest.

As set out in Assignment of Error No. I(b), fourth paragraph, in the Court's opinion (R. 130), the Court said:

"The government did not construct or have control over Denver Avenue or the bypass, although this was built with federal funds * * *."

This statement is contradicted by Ex. No. 23 (R. 293) which was a contract between the Highway Commission and F.P.H.A. In that contract the F.P.H.A. specifically agreed to construct this bypass and the Highway Commission agreed to furnish plans for the same and to maintain it during the period of the war at the expense of F.P.H.A., after which there was no arrangement or agreement as to its maintenance. This contract, we believe, shows that this was entirely constructed for a private way to the housing project; that F.P.H.A. had full control over it at all times, which is contradictory to the above quoted statement.

On page 7 of the Court's opinion (R. 134) set forth in the sixth paragraph of Assignment of Error No. 1(b), the Court said:

"But for six years after the underpass was cut and the ring levee constructed, the Drainage District, which had the continuous duty of maintenance, strengthening and repair, did not do anything either with Denver Avenue or the western embankment. All this time, the District possessed sovereign power of eminent domain and assessment for these express purposes."

About the same language appears in Finding No. 10 (R. 134) our Assignment of Error No. VIII, and we find this additional language from the Court's opinion (R. 144):

"District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands."

Now let us analyze these statements. The Court seems to suggest two ways in which this underpass could have

been protected and that it should have been done by District No. 2. We know of no other way that it could have been done except as was suggested by the Court, 1st, by the condemning of the railway fills upon the west side of District No. 1, a mile or two west and outside of the District and being in the hands of the railroad condemnation, repair and reconstruction of those railroad fills which were a mile or two in length. Being outside of District No. 2. This would have required the companies, we can see no possibility of the district having any right of eminent domain which would have permitted this action even had the District been in a position to go to this enormous expense. The appellee owned the major portion of District No. 1, in fact approximately all of the District which had been improved and also owned a considerable portion of District No. 2. Since with these holdings the appellee did not attempt to rebuild or strengthen this railway fill, can it be assumed that it would have been willing to pay its proportion of that expense or was it the District Court's idea that the balance of the District should assume this burden?

The other suggested way was to build a ring dike around the underpass within the borders of District No. 2. This property had already been condemned and taken over by the United States. The only property upon which a ring dike could have been built for this purpose. The United States took this for the very purpose of building a ring dike and did build one thereon for the apparent intent and purpose of building a ring dike for the protection of both Districts, sup-

posedly for the purpose of fulfilling the duty imposed by the Statutes of Oregon upon the United States to substitute equal protection with the highway embankment. There was nothing in the construction of this ring dike which would put a layman on notice that it was built for the protection of waters coming from the east only and for the protection of the government's housing project only. In any event we do not believe that the District would have any right of eminent domain that would take property from the United States government or the railroads.

In the Court's opinion, page 3 (R. 129), set out in the third paragraph of Assignment of Error No. 1(b), the Court said, beginning in the middle of the paragraph:

"As is readily seen, this fill, including the ring levee, could have been strengthened as a part of the work which was then being done upon the other protective works of the two districts by the United States engineers."

As to the highway embankment, it has already been pointed out that it was over three times the size and strength of any outside primary dike and that it had been subjected to heavy highway traffic for a period of about thirty-three years over the top, so there was no necessity and no reason for asking further strengthening of the highway embankment and undoubtedly the government engineers could not have been convinced any such strengthening was necessary even if it had been requested. In addition to that there was a definite spe-

cific contract on the part of the County and Highway Commission, its successor, to maintain it.

As to the failure to request the Government's Engineers to strengthen this ring dike while the work was being done on the primary dikes, the difficulty is that the work performed by the government engineers on the primary dikes in District No. 2 were completed in 1940 (R. 22) and neither this underpass nor the ring dike were constructed by F.P.H.A. until the last of 1942 and the first part of 1943. It was some two or three years before the underpass was even thought of. Elsewhere in the opinion the Court made the same comment as to the failure of District No. 1 to request the strengthening of the ring dike while their primary dikes were being strengthened by the government. The same applies to this. The work done by the government on the primary dike was completed in 1941 (R. 34) or two years before the underpass and ring dike were thought of.

In the same paragraph the opinion of the Court (R. 130), which is set forth in the third paragraph of our Assignment of Error No. 1(b) the Court further said:

"This ring levee did in fact afford some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when the western embankment failed."

The delay between the breaking of the railway fills and the ring dike was thirty hours. The principal damage resulting to the appellants was to their real properties and their improvements thereon. Just what bene-

fit this delay could have been to these appellants so far as their real property is concerned it is impossible to conceive. As we see it, it made no difference to the appellants and the damage that resulted to them whether the dike broke on May 30th between 4:00 and 4:30 P.M. or 9:00 P.M. on May 31st. It might have afforded some small opportunity to remove some personal property and to save their own lives and the lives of their children who might have been in school if it had not been a holiday. But for these no damage is claimed. It will be remembered that during this period the State officials had taken over and ordered all residents and all parties out of the District.

In *Lawrence vs. Tucker*, 160 Or. 474, 85 P. (2d) 374, it was held that a person cannot justify a trespass upon another person's property by showing that such trespass resulted in a benefit to the owners of the property upon which the trespass was committed. This was a drainage case.

Item 10. THE COURT FOUND THAT:

Two underpasses were cut through Denver Avenue embankment and therefore the unbroken embankment was not maintained by the Highway Commission, whereas in each instance the underpass was protected by the Highway Commission and the unbroken protection thus preserved.

As set forth in appellants' Assignment of Error No. I(b), paragraph 1, the Court said in its opinion (R. 129), as follows:

"The State Highway Commission which had already constructed two underpasses² in Denver Avenue * * *."

And in Note No. 2 on page 3 of said opinion (R. 129) referred to in this quotation, the Court said:

“One of these was not within the boundaries of the levee systems of Districts Nos. 1 and 2, and the other affected the system in no way but to lower the Denver Avenue fill by four feet.”

Here again the Court has omitted the meat of the evidence. The evidence as to these two underpasses constructed by the Highway Commission was placed in the PTO by the appellants for the very purpose of showing that this fill had always been considered as a continuous protection. The Court has cited them as proving the opposite. The PTO shows that the underpass at the south end of the fill, which the Court said was not within the boundaries of the levee system, was actually within the boundaries of District No. 2 but in constructing this underpass the Highway Commission moved the south dike considerably to the north and there reconnected it with Denver Avenue embankment in order that the underpass could be placed outside of the dikes. The PTO sets forth that the protection of Denver Avenue fill was thereby maintained (PTO R. 29).

The other underpass referred to by the Court was at the north end in connection with the traffic interchange which the Court says only resulted in lowering the fill by 4 feet, thus indicating that there had been no intention to protect this underpass. It is set forth in the PTO, however (R. 28), that the Denver Avenue Fill was protected from this underpass by using high ground and filling in from Union Avenue to North Portland Road and from Denver Avenue to North Portland

Road, with the result that the Denver Avenue Fill and embankment was only lowered approximately 4 feet. This left the embankment 33.6 feet or a little in excess of the lowest of the dikes surrounding District No. 2, thereby giving the District the same protection as its outside dikes. Without this filling by the Highway Commission for the very purpose of protecting District No. 2, the embankment would have been lowered to a height less than the outside dikes.

Item 11. THE COURT FOUND THAT:

There was no trespass although the easement of the appellants which was recognized by the appellee was destroyed without authority and because of it all of appellants' lands were inundated.

In paragraph 7 of Assignment of Error No. 1(b), the Court said, in its opinion (R. 137):

“No liability was thus established by creating a highly dangerous situation. These were flood waters and were not part of a column of water which agents of the government were conducting when the break occurred. So there could be no trespass.”

The Supreme Court of Oregon has adopted the theory of trespass with regard to water cast upon another's land:

Lawrence vs. Tucker, 160 Or. 474, 85 P. (2d) 374;

Boulevard Drainage System vs. Gordon, 91 Or. 240, 177 P. 956, 178 P. 796.

It has been pointed out in a previous decision of this Court, Clark vs. United States, 109 F. Sup. 213, that there is a duty irrespective of fault or intention incum-

bent upon the owner of land who impounds thereon an element, harmless in itself, but which has an inherent tendency to break destructively out of bounds, to confine the force within his own boundaries.

With the above stated duty unquestionably goes the correlative duty to not interfere with or destroy the barriers erected by the persons seeking to protect their property from damage by water, which barriers are adequate for the purpose intended, and used and relied on for that purpose.

In the present case there were two trespasses. The first was the severance of Denver Avenue and the second was the invasion of the waters coming from Peninsula Drainage District No. 1. The second trespass was the natural result of the first. This Court said in *Ure vs. United States*, 68 Fed. Sup. 779:

“When one voluntarily and deliberately does an act upon his own land which results in a physical trespass upon lands in other ownership, the liability is absolute.”

In *Clark vs. United States*, 109 Fed. Sup. 213, at page 220, the Court said:

“It is true, under certain conditions, an individual might be bound to others to maintain a dike or embankment at all events. If so, such a person might be liable in trespass for damage resulting from a break therein. Likewise, as an interesting Oregon case holds, one who in time of flood releases water from his own dam in the headwaters and thereby accelerates the flow or increases the force of a flood is properly held liable for the damage resulting from his act, but whether in trespass or no we would not debate.”

Item 12. THE COURT FOUND THAT:

There was no negligence or wrongful conduct on the part of the United States or any of its employees, whereas there is an abundance of evidence that every act taken by the Government or its employees was wrongful in the first instance and that they were negligent in every act taken by failing to provide protection for the landowners in District No. 2.

In Assignment of Error No. X, Finding No. 13 (R. 145), it is said:

“Plaintiffs have failed to prove any negligence or that plaintiff suffered damage on that account.”

In many places in the opinion and in the findings similar language is used, all of which is assigned as error, but it would seem unnecessary to point out each such instance.

It has been shown that the F.P.H.A. cut the underpass through the Denver Avenue embankment without any authority whatsoever except a permit from the Highway Commission; that the Highway Commission had no authority over this embankment except the 80 foot strip which it used for the highway and that was subject to the easement of both districts to use the same. Also, subject to the Highway Commission's and the County's obligation to maintain it. No attempt was made to procure the consent of District No. 2 nor to petition the Court for an order permitting such cutting as required by the statutes of the State of Oregon. It was cut in spite of the fact that the government had taken the land upon which the ring levee was placed subject to the easement of District No. 2 which it destroyed. It has been shown that

after the destruction of this protection for District No. 2 the F.P.H.A. with no right whatsoever seized the entire protection of Denver Avenue embankment for its own personal use to protect its own investment, and with no intention whatsoever of protecting District No. 2 which had relied upon it for some 31 years. It has been shown that the ring dike constructed by the F.P.H.A. was done for its own personal protection and not for any one else; that the ring dike was inadequate for protection from waters from the west; that it was not equal to the protection of Denver Avenue embankment which was cut, as was required by the statutes of the State of Oregon and which placed a duty upon it to provide such protection. It has been shown that the ring dike was not kept in proper repair; that F.P.H.A. was notified by their own employees that the ring dike was inadequate, resulting only in a scolding of the employees for their interference. It has been shown by the expert witnesses of the government, Mr. Turnbull and Mr. Middlebrook, that the F.P.H.A. anticipated that Denver Avenue embankment was sufficient to withstand a wall of water 4 feet in excess of that experienced in 1948 by their testimony that the ring dike was built for the protection of the government's investment in District No. 1 against the overtopping of Peninsula District No. 2's dikes which were at a minimum of 33 feet. This testimony was given by men who had no connection with the construction of the ring dike.

No evidence was offered on the part of the government by anyone having actual knowledge as to why the ring dike was built and for what purpose. The evidence of

these two experts while it necessarily showed that they anticipated that the Denver Avenue embankment was sufficient to retain a wall of water up to 37.4 feet, nevertheless their testimony must be seriously questioned from the fact that the Denver Avenue embankment had been lowered at the time of the cutting of the underpass at the traffic interchange on the north by 4 feet making the maximum height of Denver Avenue embankment 33.6 feet, or approximately the same height as the outside dikes around No. 2. It is very obvious that if Denver Avenue embankment at its lowest point was the same height as the outside dikes around District No. 2, that the construction of the ring dike up to 34.7 feet would be useless as against the overtopping of the outside dikes around District No. 2. If the water rose that high it would also top the Denver Avenue embankment at its lowest point.

Even the Court remarked at the trial that the testimony of these expert witnesses was inconsistent (Tr. R. 241). As we see it, the only conclusion that can be drawn from these expert's testimony is that they knew that the Denver Avenue embankment was so constructed and of sufficient size to withstand a wall of water to its maximum height; they knew that in time of flood there is always a danger of an unexpected break in primary or secondary dikes; they knew that all the landowners in Districts Nos. 1 and 2, including the United States, had the right to depend on and use this embankment against flood protection; but in order to find some excuse for the F.P.H.A. appropriating this entire embankment for its own exclusive use in pro-

protecting its own dollar investment, destroying its protection for the landowners in District No. 2, they jumped on to the mere coincidence that the ring dike was 1.7 feet higher than the outside dikes around District No. 2. They therefore testified the ring dike was built only for the protection against the overtopping of those dikes. They ignored the fact that the Denver Avenue embankment had been lowered at one point to 33.6 feet, the approximate height of the outside dikes. They ignored the fact that if the outside dikes were overtopped the Denver Avenue embankment would also be overtopped and the added height of the ring dike would be no protection for their dollars investment.

We believe therefore the only conclusion that can be drawn is that the ring dike was built to provide against the possible breaking of an outside dike to protect only the dollar investment of F.P.H.A. and that the rights, lives and properties in the heavily populated District No. 2 was totally ignored. It follows that if this ring dike was built against the possible breaking of the outside dikes of District No. 2 that they should have been very much more aware of a possibility of a break of the dike and railway fills surrounding District No. 1 for the reason that on the west they were protected only by railroad fills which they had no right to use or protect or repair, and no one had control of them except the railway companies which were not interested in preserving them for diking purposes.

Finally it was testified by Mr. Turnbull, one of the government's expert witnesses, that while the govern-

ment did not ordinarily construct secondary dikes that it was unsound to take one out that was already there (Tr. R. 244). Also, Mr. Diblee, the government engineer, in his completion or flood report recommended that for further protection the underpass should be eliminated.

It would seem unnecessary in view of this abundance of evidence of wrongful and negligent conduct to invoke the doctrine of *res ipsa loquitor* but in *Clark vs. United States*, 109 Fed. Sup 213, at p. 220-221, the Court said:

“Under Oregon law, where a person has complete control of an instrumentality and owes a special duty to a plaintiff, the doctrine of *res ipso loquitor* establishes a *prima facie* case if it is shown that the damage was caused by occurrence which was unexpected and which would not have taken place if there had not been some defect in the instrumentality.”

It is inconceivable how it could be found that there was no wrongful or negligent act on the part of any governmental employee and that it was the duty of Drainage District No. 2 to protect itself against this underpass in spite of everything that has been done by the F.P.H.A. to make this impossible.

ARGUMENT AS TO CONCLUSIONS OF LAW

In the Court's Conclusions of Law it adopts the Conclusions of Law set forth in the opinion. In the opinion and in the findings the Court found:

1. That the Court had jurisdiction of these cases under the Federal Tort Claims Act (Conclusions of Law, R. 146).

2. The Court in its opinion, page 7 (R. 134) found:

"It is true that one who destroys a dike against floodwaters would be liable for damage proximately caused thereby. * * *"

3. On page 7 of the Court's opinion the Court found (R. 135):

"* * * It is true that it has been held here that an employee of the Portland Housing Authority can by wrongful act or omission bind the government in damages. * * *"

4. Also, in the Court's opinion, page 7 (R. 135), the Court found:

"* * * Also, where the government acts in creating a situation on land under its control which would be held negligent under the laws of the particular state if done by a private corporation, the government can be held liable under the statute. Furthermore, the particular agent who performed the act or was guilty of the omission need not be pointed out and proved by name. Where such an act or omission is proved, responsibility cannot be escaped simply because there was a choice of means exercised by some government office or agent. The exercise of administrative discretion as a result of 'policy judgment and discretion' may free the

government from liability in handling explosives necessary for national defense in time of war. But the application of such a principal here or in the case just mentioned would emasculate the statute and return us to the day when the sovereign could do no wrong."

These pronouncements of the legal points involved seem to cover about every legal principle involved. Since appellants agree with these pronouncements and no cross appeal has been taken, there should seem little necessity for arguments as to legal principles.

All there remains to be done is to apply these pronouncements of the law to the facts in the case. This should not be difficult. Practically all the evidence is contained in the PTO which is not subject to judicial or other variation, and there was little or no material dispute in the oral evidence. Our trouble is that the District Court adopted as findings all the factual statements in the opinion as well as the PTO. This leaves the findings as we see it merely a mixture of contradictions and inconsistencies.

In Conclusion of Law No. 5, our Assignment of Error No. XV (R. 146) the Court said:

"Under the law of Oregon the legal duty to protect plaintiff's property from flood damage rested on Peninsula Drainage District No. 2 and on plaintiffs themselves as landowners within the District. This duty was continuous and involved the repair, maintenance and strengthening of existing flood protection structures. Neither the United States nor its employees owed plaintiffs any duty to protect plaintiffs' land from overflow or flood damage."

Now let's analyze this statement. As appellants see it a drainage district is merely an association of landowners subject to the same hazard. Their right as an association to build dikes for their mutual protection is a privilege, not a duty. They can build dikes of any strength they wish, adequate or not adequate. These dikes are protected against interference by anyone by the laws of Oregon whether they be weak or strong. There is no duty on the association, however, to build any. If there be any such duty, it would be to themselves only.

As between the landowners themselves, however, each landowner has the duty to its neighbors not to destroy or interfere with any of these dikes. If a dike be located on any one landowner's property, he can apply to the Court for the privilege of relocating it but is placed by Statute under the duty to the balance of the District to substitute equal protection. The District Court would reverse this and make it the duty of the balance of the District to protect the wrongdoer.

When the United States became the owner of the property in District No. 2 it had no greater and no lesser rights or duties than any private landowner. Therefore, when it cut Denver Avenue embankment it certainly owed the duty to the balance of the District to substitute equal protection. It would be a most peculiar rule indeed to hold that any landowner could cut a dike on his property and it became the duty of the balance of the District, not his, to substitute new protection. If that were the rule, the drainage and irrigation

districts in the Nation should just as well disband. They would have no protection whatever. This is especially true in a case such as the instant case where an apparent substitution was made but with hidden and concealed defects which made it worthless.

In Conclusion of Law No. 6 (R. 147), set forth in appellants' Assignment of Error No. XVI, the Court said:

"The sole cause of damage to plaintiffs was the failure of the western embankment at District No. 1. The United States was not responsible for the failure of the western embankment and no act or omission of the United States or its employees had causal connection with any damage to plaintiffs' property."

This statement stems from the adoption by the District Court of an issue not presented by the pleadings or the evidence. The facts are discussed in Item 1 of the arguments as to the facts. We call the Court's attention to that argument and particularly to the statement of the District Court in the Vanport cases, *Clark vs. United States*, supra, wherein the Court said there was "no causal connection" between the breaking of Denver Avenue and the breaking of the railway fill referred to as the western embankment.

In Conclusion of Law No. 7 (R. 147), set forth in appellants' Assignment of Error No. XVII, the Court said:

"Neither the United States nor its employees has been proved to be guilty of negligence or wrongful conduct within the meaning of the Federal Tort Claims Act."

This Conclusion is of course also based upon facts found by the Court contrary to the undisputed evidence in the case as set forth in the PTO. For argument as to the negligence, we refer the Court to Item No. 12 in this argument as to the facts.

In the Court's Conclusion of Law No. 8 (R. 47), our Assignment of Error No. XVIII, the Court said:

"The provisions of 33 U.S.C.A. 702(c) that 'No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place' is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River Basin; and it is not repealed by the Federal Tort Claims Act."

Even in this Conclusion of Law the question becomes one entirely of fact as the facts in this case do not permit the application of this provision of the statute. Appellants feel that this statute is fully, reasonably and accurately interpreted in the decision of *Clark vs. United States*, filed February 29, 1954, 218 Fed. (2d) 446, at page 451:

In its opinion the Court said:

"That section places certain conditions upon federal expenditures in aid of flood control and provides that: 'No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.'"

Later in the same paragraph in this opinion, it is said:

"The provisions of 33 U.S.C.A. § 702c barring liability 'from or by floods or flood waters' expresses a policy that any federal aid to the local authorities in charge of flood control shall be conditioned upon federal non-liability. To base recovery here on

any act or omission of the Engineers in assisting in the fight against this flood would run counter to the policy thus expressed. See *National Mfg. Co. v. United States*, 210 F. 2d 263, 270-75, 8 Cir. 1954, cert. denied, 347 U.S. 967."

The appellants believe that this properly expresses the intention of this statute. It is entirely reasonable that where the government aids a diking district in the building of its dikes or in the fighting of floods, it should not be responsible for damages resulting from any such flood. This distinguishes our case, however, completely. In the instant case there was no aiding by the government as to the improvement of Denver Avenue embankment. There is no issue in the case as to their failure in connection with the flood fight and protection of the ring dike. The entire issue is whether the United States can cut a dike at any place it sees fit not in connection with the building or aiding of any diking district., but for its own private use, and then stand behind this statute and claim no liability.

Even in the act itself it is provided that where construction is undertaken by the government in the building of dikes where it is anticipated that it will cause the flooding of lands not otherwise flooded, then it shall be the duty of the United States to acquire the title of any such land or flood rights thereover. This further expresses what is intended by this statute. That is, the government has no right under this act to do anything they like in the destruction of dikes or otherwise that would cause the flooding of lands which would otherwise not be flooded.

To hold in this instant case that the United States could cut this embankment having the duty under the Oregon laws to protect against it, and with such work done not being in the aid or construction of dikes in any district but for its own exclusive use, would result in the rule that the United States could cut holes in dikes at any place it saw fit for any purpose and would not become liable for damages as a result thereof. And in the words of the District Court, above quoted, would "return us to the day when the sovereign could do no wrong."

Even here, therefore, the application of this statute in this case becomes one entirely of fact and there is no interpretation of the facts in this case that would bring these cases under the provisions of that statute as interpreted by this Court. The District Court was probably intending to apply this rule to the railway fill as he did not recognize Denver Avenue embankment.

The final Assignment of Error as to the Conclusions of Law, Assignments of Error No. XIX and XX, is to the effect that the United States is entitled to judgment and that the Findings of Fact and Conclusions of Law are in accordance with the PTO in the opinion of the Court.

As we have pointed out, these Findings of Fact are not in accordance with the PTO nor in accordance with any evidence submitted orally. And if Findings are made in accordance with the PTO, then judgment must be given to the appellants.

CONCLUSION

We respectfully submit that none of the factual findings upon which the District Court based its decree were sufficient, taken either singly or collectively, to overcome any one of the legal principles pronounced by the District Court above set fort. These factual findings seem to us to be so inconsequential in view of these legal principles that it should hardly be necessary to mention them. However, the Court seems to have placed sufficient credence in these factual findings to overcome the legal principles which must apply. As we see it, these factual findings made by the Court which we maintain are entirely contradicted by the PTO and the undisputed evidence were not considered by the Court so much as avoiding the legal principles involved, as for the purpose of carrying out the Court's new theory of the case that the cause of this damage was the breaking of the railway fill. It would seem that the theme running through the entire decree and findings was to minimize, discredit and eliminate entirely the Denver Avenue embankment from consideration. This is about like hiding an elephant in a broom closet.

Respectfully submitted,

VIRGIL CRUM,
CRUM & SMITH,
WILLIAM C. RALSTON.

APPENDIX A





APPENDIX B

Excerpt from Exhibit No. 66, at page 11 thereof, in a portion of this exhibit which was not printed in the Transcript of record, it is said as follows:

“* * * A search of the side slopes and toes of Denver Avenue was made by these men in an attempt to determine the type and extent of a reported plug of said culvert made in approximately 1940 by means of W.P.A. forces in order to completely separate the pumping operations of the two districts as Peninsula District No. 2 was having a new pumping plant installed at that time, said work being performed under the direction and supervision of the Corps of Engineers. * * *”

In the United States
Court of Appeals
for the Ninth Circuit

MEARL C. TILLMAN and
EMILY P. TILLMAN,

vs. Appellants,

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

On Appeal from the United States District Court
for the District of Oregon

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FILED

JUN 15 1955

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**In the United States
Court of Appeals
for the Ninth Circuit**

MEARL C. TILLMAN and
EMILY P. TILLMAN,
vs. Appellants,
UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE UNITED STATES

Jurisdiction

District Court jurisdiction of these cases depends upon the Tort Claims Act, 28 U.S.C.A. 1346(b). Jurisdiction of this Court depends upon 28 U.S.C.A. 1291.

Statement of the Case

These cases arise out of the 1948 Columbia River flood. That flood, the second highest in the history of the river (R. 80), was a major catastrophe in the history of the Northwest. It inundated more than 400,000 acres of land (R. 80), it took the lives of forty-one persons (R. 80), and it did property damage estimated at \$100,000,000 (R. 80). On the afternoon of May 30, 1948, the flood waters broke through the western embankment at Peninsula Drainage District No. 1 (R. 80), a drainage district situated along

the south bank of the river on the outskirts of Portland. Within an hour Vanport, a large housing project belonging to the United States and located within the district, was flooded and the property of the Vanport tenants destroyed (R. 81). Fourteen Vanport residents lost their lives but about 16,000 persons were safely evacuated.

As the flood water filled District No. 1 it exerted pressure on Denver Avenue, a highway fill which separates that district from Peninsula Drainage District No. 2. A flood fight was conducted along Denver Avenue but some thirty hours after the initial failure and between 9:00 and 10:00 P. M. on the night of May 31, 1948, a ring levee surrounding an underpass built through Denver Avenue failed (R. 81), permitting the water to enroach upon and eventually fill that portion of District No. 2 which lies between Denver Avenue and another highway fill known as Union Avenue (R. 81). Two or three hours later the Union Avenue fill failed (R. 81) and District No. 2 was completely inundated. These cases present claims, totaling more than \$1,000,000, for flood damage by persons owning property in District No. 2 (R. 13).

Between 600 and 700 actions were filed in the Oregon District Court asserting claims against the United States on account of the 1948 flood damage. Of these, some 600 cases presenting claims of 3,000 plaintiffs were filed by residents of Vanport. Twenty of the Vanport cases were consolidated as a test case and tried before the Honorable

James Alger Fee, who, finding no negligence and as a matter of law no liability in any event, gave judgment for the United States. See *Clark v. United States*, 13 F.R.D. 342, 109 F. Supp. 213 (1952). That judgment was affirmed by this Court (*Clarke v. United States*, 218 F. 2d 446 (C.A. 9 1954)) and it has since become final. While the appeal of the Vanport cases was pending Judge Fee tried the fifty-two consolidated cases (R. 125, 126) which are now before the Court and again concluded, both for reasons of fact and law, that the United States was not liable (R. 127-149). Plaintiffs have appealed.

(a) Peninsula Drainage Districts Nos. 1 and 2.

Peninsula Drainage Districts Nos. 1 and 2 are located on the outskirts of Portland along the southern bank of the Columbia River approximately five miles above the confluence of the Columbia and the Willamette (R. 16). The area between the confluence of the rivers and District No. 1 is open land subject to flood during periods of high water. District No. 1, where Vanport was located, is protected on three sides by levees: on the north along the river (R. 30), on the south along Columbia Slough (R. 31), and on the west by the so-called western embankment, a structure consisting of two railroad fills and a highway fill (R. 38). Along the eastern boundary of District No. 1 is the highway known as Denver Avenue and beyond that Peninsula Drainage District No. 2 where appellants owned property (R. 16). District No. 2 is surrounded by its own levee

system: on the north along the river (R. 16), on the south along Columbia Slough (R. 16), and on the east along an excavated channel known as the City Cut (R. 16). Along the western boundary of District No. 2 is, of course, Denver Avenue (R. 16). All this means that flood water cannot reach Denver Avenue unless one of the primary or river front levees fails or is overtopped (R. 30, 170, Exs. 1, 2).

Peninsula Drainage District No. 1, the downstream district, was organized on June 1, 1917 (R. 25). At that time the Denver Avenue fill was already in existence (R. 30) and the railway fills along the west side of the district were or were about to be constructed (R. 30). Shortly thereafter and on September 25, 1917 Peninsula Drainage District No. 2 was organized (R. 17, 302-333). During the following year the District No. 1 levees were completed (R. 30-31) and within a year or two District No. 2 had built levees on the north, south and east (R. 17), thus completing the protection for the entire area. In the period between 1936 and 1941 the Corps of Engineers, under specific Congressional direction, raised and reconstructed the north and south levees of District No. 1 (R. 32-35) and the north, south and east levees of District No. 2 (R. 19-22). The work of the Corps at District No. 1 was completed in 1941 (R. 34) and at District No. 2 in 1940 (R. 22). The levees surrounding these drainage districts do not belong to the United States (R. 22, 35).

(b) Denver Avenue and the Denver Avenue underpass.

Highway traffic going north from Portland crosses the Columbia River on the so-called Interstate Bridge. Denver Avenue and the fill supporting it were constructed in 1915 and 1916 as an approach to this bridge by Multnomah County at the expense of the Interstate Bridge Commission (R. 22). The fill was constructed on a right-of-way conveyed in fee to Multnomah County by Peninsula Industrial Company by a deed dated March 16, 1915 (R. 23, 455). The deed also granted slope easements to the county, that is, the right to locate the slopes of the fill on the adjoining property of the grantor (R. 457). The deed reserved to the grantor the right to construct public and private highway crossings (R. 458), railroad tracks (R. 458), underground pipes and conduits (R. 459) and two deep water channels "not to exceed one hundred (100) feet in width" across, under or through the right-of-way (R. 459). The deed went on to provide that it was made upon the express condition "that the said Multnomah County shall within three (3) years from the date of this conveyance construct or cause to be constructed and thereafter maintained * * * a fill and embankment" on the property "and shall, within said period, provide and thereafter maintain a public highway over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereover * * *" (R. 461-2). The highway and supporting fill, as constructed, were apparently slightly off the right-of-way, for

on December 31, 1926 a correction deed was given by Peninsula Industrial Company to the county (R. 465-8).

The Interstate Bridge Commission transferred control of Denver Avenue to Multnomah County on January 1, 1929 (R.27). On March 26, 1937 the Oregon State Highway Commission took charge of Denver Avenue and on that date Denver Avenue became an Oregon state highway (R. 27). Since then Denver Avenue has been owned by the State of Oregon and controlled by the Oregon State Highway Department (R. 28). Denver Avenue has been in regular use as a public highway since it was first constructed in 1915 and 1916 (R. 28). It is one of the principal approaches to the Interstate Bridge (R. 245) and it is heavily traveled.

Denver Avenue and the fill supporting it were referred to in the proceedings for the organization of Peninsula Drainage District No. 2. Phillip H. Dater, the district engineer, in reporting on the work to be done to protect the district lands from overflow, called attention to the fact that the Denver Avenue fill (then known as the Derby Street fill) was already in existence. "The district has for its west boundary the Derby Street fill of the Interstate Bridge, which also constitutes the east boundary of Peninsula Drainage District No. 1—this fill upon completion of District No. 2 will not act as a dike since District No. 1 will be reclaimed by its west, north, and south levees, connecting with system No. 2. It will, however, constitute an additional

element of security to Districts Nos. 1 and 2." (R. 335).

In March, 1928, the supervisors of District No. 2 proposed and the Multnomah County Court approved an amendment to the plan of reclamation for the district (Exs. 72, 73, 74). The petition notes the elevation of the Denver Avenue fill at 33 feet m.s.l., the elevation of the levees of District No. 1 at 32 feet, calls attention to the fact that the levees of District No. 2 had been constructed only to 28 feet (Ex. 72, pp. 2-3) and proposes that these levees be raised to 33 feet (Ex. 72, p. 5). This work was apparently done as proposed (R. 18) and later, as has been noted, the levees were once more rebuilt by the Corps of Engineers (R. 19-22). Neither the district nor the Corps did any work on the Denver Avenue fill (R. 18-22).

During the summer of 1942 Kaiser Company, Inc., in order to provide war housing for its shipyard employees (R. 45), contracted with the Federal Public Housing Authority to construct, within District No. 1, on a cost-plus-a-fixed fee basis the housing project known as Vanport (R. 47). The construction work was subcontracted by Kaiser to two Portland contractors, George H. Buckler and Charles B. Wegman (R. 47, Exs. 6, 7). Since Vanport was to provide housing for several thousand persons (R. 47) highway access to and from the area had to be provided. Denver Avenue, which parallels the project, was available for this purpose. But because of the heavy traffic on Denver Avenue to and from the Interstate Bridge any arrangement

whereby Vanport traffic would cross Denver Avenue traffic at grade would have been "highly dangerous" (R. 246, 283). Accordingly the Kaiser interests proposed to the Oregon State Highway Commission that an underpass be constructed through Denver Avenue, thus permitting the Vanport traffic to enter Denver Avenue without crossing it (R. 283). The Highway Commission approved this proposal (R. 246) and furnished Kaiser with detailed plans and specifications for the underpass (R. 49, 288, 290, 292). The underpass was constructed in accordance with the Commission plans (R. 49) under the supervision of a Commission engineer (R. 50). The actual work was done by Tower Sales & Erecting Company, a Portland contractor (R. 49) under a contract (R. 259-281) between Kaiser and Tower approved by F.P.H.A. (R. 281). Work on the underpass began in November, 1942, and it was completed in February or March, 1943 (R. 49-50).

Promptly upon approving the plans for the Denver Avenue underpass, R. H. Baldock, the chief engineer for the Highway Commission, wrote to Peninsula Drainage District No. 1 (R. 285) and to Peninsula Drainage District No. 2 (R. 251, 339) advising of the proposed underpass and pointing out "that the State is under no obligation to maintain the road grade as a dike facility in any respect" (R. 286). Ivan F. Phipps, president of District No. 1, replied, arguing that Denver Avenue was one of the dikes of District No. 1 and asking for copies of the plans (R. 286-7).

The plans were sent to Mr. Phipps (R. 288) and a few days later the chief counsel for the Commission wrote to Mr. Phipps flatly rejecting any suggestion that Denver Avenue was a levee (R. 289). This correspondence, it will be noted, was all with District *No. 1*. As to District *No. 2*, the record shows that the district supervisors received a letter from the Highway Commission about the underpass (R. 339) and decided first that Mr. Phipps (R. 339) and later that the district secretary (R. 346) should write to the Commission. Mr. Phipps wrote only on behalf of District *No. 1* (R. 286) and the secretary apparently did nothing. The minutes of the District *No. 2* supervisors state that "The Board of Directors feel that a stop-log should be erected on this underpass" (R. 347). There is nothing to show that this suggestion was ever passed along to the Commission or to Kaiser. In any event no stop-log structure was placed in the underpass either by District *No. 2* or anyone else. The underpass was discussed at the annual meeting of the District *No. 2* landowners held October 26, 1942, but no action was taken (R. 342). No one of the appellants ever advised the United States or any agency or employee of the United States that in his opinion the construction of the Denver Avenue underpass was a violation of his rights (R. 83).

(c) The ring levee.

About the time the Denver Avenue underpass was being constructed a semi-circular ring levee was built around and to the east of the underpass (thus within District *No. 2*)

on land owned by the United States (R. 58). The work was done by the contractors working on the underpass and particularly by Berke Bros. Construction Company (R. 50). The levee was built from sand in six inch lifts, that is, the sand was spread in six inch layers and compacted by the movement of bulldozers and other equipment across it (R. 50). The work was completed in April, 1943 (R. 50). In the fall of 1943, Fred Christensen, a Portland contractor, acting pursuant to arrangements with one of the Vanport subcontractors and in accordance with plans prepared by Kaiser Company, Inc., raised the elevation of the ring levee, widened its top and placed a clay blanket on its eastern or outside slope (R. 50-51, 296, 301). In the spring of 1944 employees of the Housing Authority of Portland, the lessee of the Vanport and East Vanport projects, discovered cracks and sloughs in portions of the ring levee (R. 54). In the summer or fall of that year Housing Authority employees repaired the levee by capping the crown, reworking the areas where sloughs had occurred and filling in the cracks (R. 54). There was no further difficulty with the levee (R. 418) and no further work was done on it prior to the failure (R. 54).

There is no direct evidence in the record as to why the ring levee was constructed. The contractors who built it were not called as witnesses. Apparently, however, one purpose, at least, of the levee was to protect Vanport and District No. 1 from flood waters moving into that district

from District No. 2 (R. 225, 239). The District No. 2 levees were lower than those of District No. 1 (R. 44) and could therefore have been overtopped when the District No. 1 levees were still above flood level (R. 225, 239). Inevitably, however, the ring levee also provided protection to District No. 2—witness the fact that it held the flood waters for thirty hours (R. 81), thus permitting District No. 2 to be safely evacuated (R. 81).

(d) The failure.

On the afternoon of May 30, 1948 when the elevation of the flood water was 30.8 feet m.s.l. (R. 80), the railroad and highway fills which constituted the western embankment at District No. 1 failed (R. 80) permitting the flood water to fill District No. 1 (R. 81), thereby flooding and destroying Vanport. The following morning District No. 2 was evacuated by order of the Oregon governor (R. 81).

As the flood waters filled District No. 1 they advanced across the district and began to exert pressure on the Denver Avenue fill and, by passing through the Denver Avenue underpass, on the ring levee. Trouble first developed not with the ring levee but with the fill itself at the site of a large culvert, approximately 5 feet by 5 feet in size, constructed through the fill at about ground level (R. 53). The flood water blew out the plugs in the culvert and the fill began to cave and slough (R. 184, 209-210, 217, 248).

By good luck and good management the culvert was re-plugged, thus averting a failure. Shortly thereafter, however, the ring levee suddenly broke, permitting the flood waters to enter District No. 2. There is conflicting testimony in this record as to whether the Denver Avenue fill would have been able to withstand the pressure of the flood water if the ring levee had not failed (R. 217, 205, 167). R. H. Baldock, the chief engineer of the Highway Commission, and Harry K. Doyle from the Corps of Engineers, both of whom participated in the Denver Avenue flood fight, testified that in their opinion the Denver Avenue fill would itself have failed if the ring levee had not done so (R. 217, 249).

The failure of the ring levee permitted the flood waters to advance across District No. 2 from Denver Avenue to Union Avenue, another highway fill so located that it bisects the district in a diagonal fashion (R. 55). Union Avenue held the water for two or three hours; then it too failed (R. 81) permitting the flood to inundate the entire district and to do the damage for which appellants seek compensation (R. 81).

Summary of the Argument

The judgment below should be affirmed:

1. Denver Avenue is and always has been a highway and nothing else. It was constructed for highway purposes; for more than thirty years it has been consistently used for

highway purposes; and as a result of that continuous use it is dedicated to the public for highway purposes. The construction of the Denver Avenue underpass was a legitimate highway measure necessary for the safety of the traveling public. The underpass was constructed with the consent and under the supervision of the Oregon State Highway Commission. By express provision of the Oregon statutes that Commission has full jurisdiction and control over Denver Avenue and all other Oregon state highways. The construction of the underpass was therefore in all respects lawful and proper.

2. Denver Avenue is not and never has been a levee or considered to be such by appellants or by Drainage District No. 2. But even if appellants had hoped or expected that Denver Avenue would provide flood protection for their properties if the occasion arose, that hope or expectation would not and did not obligate the State of Oregon, the owner of Denver Avenue, to maintain Denver Avenue as a levee for the benefit of appellants or to refrain from taking such measures in connection with Denver Avenue as might be necessary or appropriate for the safety of the traveling public. The paramount right in connection with Denver Avenue is and was the right of the public to safe travel.

3. Appellants have no interest in and no rights in connection with Denver Avenue. Appellants do not own the fill, the land on which it rests, or the adjoining property. Appellants have made no contribution to the cost of build-

ing or maintaining Denver Avenue. They have no rights by statute or by contract. The right-of-way deed did not obligate Multnomah County or the State of Oregon as its successor to maintain Denver Avenue as a levee and appellants are not entitled to the benefit of that obligation even if it existed. The obligations under the right-of-way deed are, moreover, expressed as conditions subsequent, the only remedy for a violation of which would be a forfeiture of the right-of-way to Peninsula Industrial Company—a forfeiture which has not been and cannot now be declared. Moreover, the right-of-way deed itself provides for public and private highway crossings “over, under or across” the right-of-way. The construction of the Denver Avenue underpass was not a violation of the deed provisions and even if it had been it would not have been a violation of any right of appellants.

4. The Denver Avenue underpass was not constructed by the United States or its employees and the negligence or wrongful conduct, if any, of the employees of government contractors is not actionable under the Tort Act.

5. The United States had no obligation to construct or maintain a levee at the site of the underpass or to take any action whatever to protect appellants from flood damage. The obligation to provide flood protection for appellants’ property rested with appellants themselves or with Peninsula Drainage District No. 2. There has been no proof, moreover, of any negligence or wrongful conduct in connection

with the construction or maintenance of the ring levee. The ring levee failed under pressure of flood waters approaching from the west. No one, including appellants, foresaw and in the exercise of due care no one could have foreseen that the western embankment of District No. 1 would fail, thus permitting flood waters to approach the ring levee from the west.

6. The ring levee was not constructed or maintained by employees of the United States and the negligence or wrongful conduct, if any, of the employees of government contractors is not actionable under the Tort Act.

7. The cause of the flood damage to appellants' property was the failure of the western embankment at Peninsula Drainage District No. 1 (which was not owned or maintained by the United States and for which the United States was in no way responsible) operating on conditions created by the failure of appellants and Peninsula Drainage District No. 2 to provide flood protection for appellants' lands. The 1948 Columbia River flood was an "act of God" for which the United States was in no way responsible.

8. Appellants assumed the risk of flood damage by failing during the long period subsequent to the construction of the Denver Avenue underpass and the ring levee to provide further flood protection for their lands. Most if not all of the appellants, moreover, acquired or improved their properties after the Denver Avenue underpass and

the ring levee were constructed, thereby deliberately assuming whatever risks were inherent in the situation.

9. These cases are pure afterthought. No one of the appellants prior to the 1948 high water ever advised the United States that the United States had any flood protection obligations to him, or that the construction of the Denver Avenue underpass was a violation by the United States of his rights, or that the ring levee was inadequate or improperly maintained, or that there was any risk of flood waters approaching Denver Avenue from the west.

10. The United States has no connection with these cases except that the United States decided to arrange for the construction of Vanport and acquiesced in the decision of the Oregon State Highway Commission and the Vanport contractors to build an underpass through Denver Avenue and in the subsequent decision of the Vanport contractors to construct a ring levee about this underpass. Everything done by the United States called, therefore, for an exercise of discretion as to which there can be no liability under the Tort Act.

11. 33 U.S.C.A. 702(c), providing that the United States shall not be liable for flood damage, is an absolute bar to these claims.

12. The court below had no jurisdiction of these claims since the cause of action, if any, accrued prior to January 1, 1945 (28 U.S.C.A. 1346(b)).

The District Court, recognizing the force of these contentions, gave judgment for the United States. That judgment was correct.

Argument

1. Denver Avenue is and always has been a highway and not a levee.

Appellants rest their case fundamentally on two propositions: that Denver Avenue is a levee and that appellants have rights in Denver Avenue which were violated by the construction of the underpass. Neither has any support in the record. With respect to Denver Avenue the District Court found:

"8. Denver Avenue, the boundary between the two districts, was not intended to be a levee and was not designed as a water-repellant wall or structure. The plan for Reclamation of District No. 2 specifically stated that no reliance was placed on Denver Avenue, and Denver Avenue is mentioned only casually as furnishing additional protection. Neither District No. 1 nor District No. 2 ever spent time or money in attempting to strengthen Denver Avenue. In the period between 1934 and 1944, the United States, acting through the Corps of Engineers, reconstructed the north, south and east levees of District No. 2. District No. 2 approved the plans for the work but made no request that Denver Avenue be strengthened as part of the protective works. Denver Avenue was built and has ever since been used for highway purposes. Neither Multnomah County, the State of Oregon, the United States nor anyone else has or had any obligation to maintain Denver Avenue as a levee or for flood protection purposes." (R. 142-3)

The finding that Denver Avenue "was not intended to be a levee" (R. 142) has overwhelming support in the record. Indeed, the arguments of appellants notwithstanding, there is in this record no evidence whatever that Denver Avenue was ever intended to be a flood protection structure. It is and always has been a highway and nothing else. There are many reasons:

First. Denver Avenue was built exclusively for highway purposes. It was built by the County of Multnomah at the expense of the Interstate Bridge Commission as one of the approaches to the Interstate Bridge (R. 22). The Interstate Bridge Commission obviously had nothing to do with levee construction.

Second. Denver Avenue was built before either drainage district was organized (R. 22, 17, 25) and therefore at a time when the land on both sides of Denver Avenue was subject to flood. The fact that no one was then planning to reclaim this land is demonstrated by the provision of the right-of-way deed for two deep water channels across the right-of-way (R. 458-9).

Third. The right-of-way deed makes it crystal clear that Denver Avenue and the Denver Avenue fill were to be constructed not for levee but for highway purposes. The deed refers repeatedly to the fact that the land is to be used for a highway. It provides, for example, with respect to certain deep water channels that the grantor "shall con-

struct said crossings in such manner as not unreasonably to interfere with the traffic over said parcels of land *as a highway*”* (R. 459); it provides that certain connecting fills “shall be constructed, maintained and used in such manner as not to interfere with the convenient use or occupation of *any roadway* maintained or to be maintained by Multnomah County or the public on either of said parcels of land” (R. 460); it requires the county to “provide and thereafter maintain a *public highway over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereover*” (R. 461-2); and finally, it provides “that no toll shall ever be collected by the said Multnomah County for any travel *over any highway* constructed over Parcel B as herein described” (R. 462). Moreover, the correction deed of December 31, 1926 (R. 465) says specifically that the grant was for a highway. It recites that the first conveyance was “*for highway purposes*” (R. 465); that “*it was the intention of the parties that the county was to construct certain fills and highways upon said parcels*” (R. 465); and that the county should “*have no interest in land not used or intended to be used for said highways*” (R. 465). This repeated reference in the deeds to highways and highway purposes is to be compared with the fact that nowhere in the deeds is there any mention whatever of levees, dikes, floods or flood protection. Indeed, the deeds affirmatively

*Emphasis is supplied throughout this brief unless otherwise noted.

demonstrate that no one intended or anticipated that Denver Avenue would serve as a levee or that the fill would be maintained in a continuous and unbroken fashion. The March 16, 1915 deed carefully reserves to the grantor and its successors* a series of rights wholly inconsistent with any purpose to use the Denver Avenue fill as a levee. It is provided that the grantor shall have:

“(a) The right to dedicate as provided by law public highway crossings and to pay out and use private highway crossings *over, under or across* either or both of said parcels of land hereby conveyed * * *

“(b) The right to cross with railroad tracks for industrial and switch track purposes *under, over or at grade* either or both of the parcels of land hereby conveyed * * *

“(c) The right to construct and to maintain at the expense of the grantor or its successors *one (1) crossing not to exceed one hundred (100) feet in width under and through each of said parcels of land hereby conveyed, to be used by the grantor for a deep water channel*, the location of said crossings on each of said parcels of land to be designated by the grantor * * *

“(d) The right to cross and recross said parcels of land hereby conveyed with *underground* pipes and conduits and with overhead or *underground* telephone, telegraph, electric light, power or other wire crossings * * *

”(R. 458, 459).

*There is good reason to believe that the United States is the successor in interest to Peninsula Industrial Company, the grantor of the right-of-way deed. That company at the date of the deed owned the property adjoining the right-of-way (R. 457, 316). The land adjoining the right-of-way now belongs to the United States (Exs. 64, 76, 77, 78).

In the face of these provisions for public and private highway and railroad crossings, underground pipes and conduits and two deep water channels 100 feet in width through the Denver Avenue fill, it is difficult to take seriously the suggestion that the fill was intended to act as a levee.

Fourth. Denver Avenue has never been considered to be a levee.* The organization papers for District No. 2 recognize that Denver Avenue was not expected to act as a levee. The district engineer in reporting on the work to be done by the district (R. 334) referred to the Denver Avenue or Derby Street fill, as it was then known:

"The district has for its west boundary the Derby Street fill of the Interstate Bridge, which also constitutes the east boundary of Peninsula Drainage District No. 1—*this fill upon completion of District No. 2 will not act as a dike* since District No. 1 will be reclaimed by its west, north and south levees connecting with system No. 2. It will, however, constitute an additional element of security to Districts Nos. 1 and 2." (R. 335).

This seems clear enough: Denver Avenue is not a dike; protection from the west is to be provided by the levee system of District No. 1. Pursuant to this understanding

*Appellants argue that by building the ring levee the Vanport contractors recognized that Denver Avenue was a flood protection structure. This assumes far too much. The construction of the ring levee implies nothing beyond the obvious fact that the Denver Avenue fill *as a highway fill* might well (as it did) provide temporary protection if the occasion arose, thereby permitting an orderly evacuation of the area.

the district engineer recommended (R. 336) and the districts installed a large, open culvert, 5 feet by 5 feet, through the Denver Avenue fill so that the District No. 1 pumping plant could serve both districts (R. 337, 25). Many years later this culvert was plugged (R. 53), but the fact that for at least fifteen years it remained open demonstrates that no one expected Denver Avenue to act as a levee.

In March, 1928, District No. 2 asked court approval for an amendment to its plan of reclamation (Ex. 72). The petition recites "the construction of dikes and levees surrounding the District to an elevation of twenty-eight feet" (Ex. 72, p. 2), the construction of the Derby Street approach to the Interstate Bridge to an elevation of thirty-three feet (Ex. 72, p. 2) and the construction of the levees of District No. 1 to an elevation of thirty-two feet (Ex. 72, p. 2) and proposes that: "The dikes and levees surrounding said Peninsula Drainage District Number Two shall be increased in height from the present elevation of twenty-eight feet at the top to an elevation of not exceeding thirty-three feet at the top." (Ex. 72, p. 5). The petition was granted as prayed (Ex. 73). It will be noted that in these proceedings papers Denver Avenue is not included among "the dikes and levees surrounding said Peninsula Drainage District Number Two".

The subsequent history of Denver Avenue is all to the same effect. On March 26, 1937 control of Denver Avenue was transferred to the Oregon State Highway Commission

(R. 27) and ever since Denver Avenue has been owned by the State of Oregon and controlled by the Commission (R. 28)—an arrangement entirely appropriate for a highway but entirely inappropriate for a district levee. In the period from 1936 to 1940 the Corps of Engineers worked extensively on the levees of both drainage districts (R. 19-22, 32-35), but as the court below pointed out, no one ever suggested that the Corps do any work on the Denver Avenue fill (R. 143). Finally, when in connection with the construction of the underpass it was suggested by District No. 1 that Denver Avenue should be regarded as a dike (R. 287), that suggestion was rejected promptly and emphatically by counsel for the Highway Commission (R. 289):

“The structure through which it is proposed to make the underpass is a highway grade and has always been such since its construction. It is my opinion that no use of such highway grade by an irrigation district imposes any liability on the State or the Highway Department; and, therefore, until I am otherwise convinced, I shall advise the Highway Commission that it may, without liability, use the Denver Avenue approach which is a highway grade for any use consistent with and which contributes to public travel and public convenience.”

This has always been the position of the Commission (R. 247).

Thus it turns out that for a host of reasons the court below was correct in concluding that Denver Avenue was a highway and not a levee: because it was built exclusively

for highway purposes before either district was organized; because the right-of-way deeds make it clear that the fill was constructed for highway and not levee purposes; and because Denver Avenue has never been considered to be or maintained as a levee. The alleged failure, therefore, to maintain the fill as a levee was in no way wrongful.

2. The construction of the Denver Avenue underpass was lawful and proper.

The fact that Denver Avenue is a highway makes the construction of the underpass altogether lawful and proper. In 1942-3 when the underpass was constructed Denver Avenue was an Oregon state highway (R. 27) owned by Oregon and controlled by the State Highway Commission (R. 28). The Highway Commission determined that the underpass was necessary for safety reasons. R. H. Baldock, the Oregon State Highway engineer, testified as follows:

“Q. What was the purpose of the proposed underpass?

A. To give access to the town of Vanport.

Q. Was this a proper purpose from a highway and traffic point of view?

A. It was.

Q. *Was there some safety factor involved in providing for the underpass?*

A. *It would have been highly dangerous to try to make the access without separating the opposing streams at grade.*

Q. *Did that require the construction of the underpass?*

A. *It did.*

Q. Did you approve the proposal for the construction of the underpass?

A. I did.

Q. Did your office prepare the plans for the construction of the Denver Avenue underpass?

A. Yes.

Q. Did an engineer from your office supervise the construction of the underpass?

A. Yes." (R. 246)

Since, as this testimony makes clear, the Commission not only concluded that the underpass was necessary for safety reasons but actually prepared the plans and supervised the work, there can be no doubt that the construction of the underpass was lawful. For under the Oregon statutes the jurisdiction of the Oregon State Highway Commission over state highways such as Denver Avenue is plenary and absolute. In 1942, 114 O.C.L.A. 100 (3 Or. Rev. Stat. 366.205) provided:

"The commission shall have full power to carry out the provisions of this act, and said commission hereby is given general supervision and control over all matters pertaining to the selection, establishment, location,

construction, improvement, maintenance, operation and administration of state highways, the letting of contracts therefor, the selection of materials to be used therein, and all other matters and things necessary or proper or deemed necessary or proper for the accomplishment of the purposes of this act, and said commission is likewise given complete jurisdiction and authority over all state parks, recreational grounds, or places acquired by the state for recreational purposes.”

This broad grant of authority was confirmed by Section 115 (3 Or. Rev. Stat. 366.220):

“§ 100-115. *Specific powers and authority of highway commission.* In addition to such general powers as may be necessary and incident to the performance of its duties under the provisions of this act the commission hereby is given specific power and authority to do and accomplish the following things:

“(1) System of Highways. Select, establish, designate, construct, maintain, operate and improve or cause to be constructed, maintained, operated and/or improved a system of state highways within the state of Oregon, which highways shall be designated by number and by the point of beginning and the terminus thereof.”

The Commission, as the statute says, has “general supervision and control over all matters pertaining to the * * * construction, improvement, maintenance, operation and administration of state highways * * *”. Under this broad grant of authority the Commission certainly had full power to authorize construction of the underpass. For

it is, of course, well settled that the state, acting through the appropriate agency, has plenary power over the highways, including authority to take appropriate safety measures. "The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). "The Legislature has full authority over the highways of the State and may lay out their routes and regulate their use." *Marshall v. State*, 171 S.W. 2d 269, 270 (Tenn. 1943). "That the Legislature exercises plenary control over public highways, whether they be public, state or county roads or streets in municipalities, is established beyond question in this state." *Roney Inv. Co. v. City of Miami Beach*, 174 So. 26, 29 (Fla. 1937). For Oregon cases recognizing the broad powers of the Highway Commission, see *Tomasek v. State*, 248 P. 2d 703 (Or. 1952); *Cabell v. City of Cottage Grove*, 130 P. 2d 1013 (Or. 1943), 144 A.L.R. 286; *Warren v. Bean*, 115 P. 2d 167 (Or. 1941). Since Denver Avenue belonged to Oregon and since the Highway Commission had full power under Oregon law to regulate its use, how can it be said that the construction of the underpass, approved by the Commission as a necessary safety measure, was in any way unlawful?

3. Even if the construction of the Denver Avenue underpass had been unlawful, no right of appellants would have been violated.

Appellants have established no interest in or claim upon Denver Avenue; accordingly even if the construction of the underpass were for some reason wrongful appellants could not be heard to object. Appellants are individuals owning property at various locations in Peninsula Drainage District No. 2. No one of the appellants owns or claims to own Denver Avenue itself or the land upon which it rests. The highway, the fill supporting it and the right-of-way beneath it all belong to the State of Oregon (R. 28). The fill at its base is wider than the right-of-way but that is of no consequence for at least two reasons: first, because the right-of-way deed contains the customary slope easement, that is, "the right to place the toe of the slopes of any embankments upon the real property belonging to the grantor adjoining that described in Parcels A and B herein" (R. 457), and second, because beginning in 1942 the owner of the property adjoining the right-of-way was the United States and not the appellants or any one of them (R. 58, Exs. 76, 77, 78). No one of the appellants has, therefore, any property right which the construction of the underpass could be said to violate.

Appellants argue for some sort of "easement" whereby Multnomah County was obligated to maintain Denver Ave-

nue as a levee. No such "easement" exists and even if it did appellants could not claim the benefit of it.

First. The parties to the right-of-way deed, as this brief has pointed out, never intended that Denver Avenue should be a levee. A fill to be intersected by highway and railroad crossings and two deep water channels 100 feet in width cannot have been intended as a levee.

Second. The right-of-way deed says nothing whatever of floods, levees or flood control. The obligation to construct and maintain the fill is by its very terms an obligation to "maintain a public highway over said Parcel B" (R. 462). This obligation, expressed in the deed as a condition subsequent, must under the Oregon cases be strictly construed with all doubts resolved against any restrictions limiting or forbidding any legitimate use of the property for highway purposes. "Conditions subsequent are not favored in law, and are to be strictly construed, because they tend to destroy estates, and generally all doubts are resolved against restrictions on the use of property by the grantee or devisee * * *". *Gange v. Hayes*, 237 P. 2d 196, 200 (Or. 1951). See also *Clark v. Jones*, 144 P. 2d 498, 500 (Or. 1943) and *City of Portland v. Terwilliger*, 19 Pac. 90, 94 (Or. 1888). Appellants, contrary to the cases, are not only asking the Court to resolve all doubts in favor of, rather than against, a supposed restriction on the use of the property but actually to create that restriction without a word in the deed to support it.

Third. The right-of-way deed in providing for a highway impliedly authorized all measures, including underpass construction, which might be appropriate to that end. "The dedication of a street to public use authorizes any ordinary use for street purposes * * *". *Finch v. Riverside Ry. Co.*, 87 Cal. 597, 598 (1891). The deed itself recognizes that the construction of "public highway crossings * * * over, under or across" the right-of-way might be appropriate (R. 458). Indeed, any provision in the right-of-way deed which might be construed to limit the power of the Highway Commission to build the underpass or to take other appropriate highway measures, would be void as repugnant to the grant. *Wills v. Los Angeles*, 209 Cal. 448 (1930).

Fourth. The Oregon courts have held that a breach of a condition subsequent which is merely technical or which is pursuant to an exercise of the police power will not forfeit the property. *Clark v. Jones*, 144 P. 2d 498, 500 (Or. 1943); *City of Portland v. Terwilliger*, 19 Pac. 90, 95 (Or. 1888). The Denver Avenue underpass was built as a safety measure for the protection of the traveling public. It was, therefore, a proper exercise of the police power of the State. This means, under Oregon law, that there has been no actionable violation of the deed provisions.

Fifth. Appellants have no standing to complain about a violation, if any, of the deed provisions. Appellants argue that they are the successors in interest to Peninsula Industrial Company and therefore entitled to take advantage of the

deed provisions reserving rights to the grantor and its successors. There is, however, no evidence in this record to support that argument—nothing from which it could be concluded that appellants or any of them are in actual fact the successors in interest to Peninsula Industrial Company. At the trial no one of the appellants identified the property he owned in District No. 2 or made any effort to prove that Peninsula Industrial Company was in truth his predecessor in interest. The only title evidence before the Court is the description of property ownerships contained in the District No. 2 organization papers. Those papers show that as an original matter the district lands were not owned by Peninsula Industrial Company but by forty-six different interests (R. 307-29). How then can it be assumed that appellants or any of them succeeded to the particular ownership of Peninsula Industrial Company?

Moreover, if one of the appellants did succeed in proving title through Peninsula Industrial Company he would not on that account, under the Oregon cases, be entitled to assert a position based on the right-of-way deed. Since the obligation of the grantee under the deed is stated as a condition subsequent and not as a covenant the only remedy for breach of the condition is a right of re-entry. "If the language imports a condition merely, and there are no words importing an agreement, it is not enforceable as a covenant." 26 C.J.S. 473. "Ejectment is the proper remedy to be employed by the grantor of real property to recover the same

for breach of a condition subsequent and may be maintained without previous demand for possession." *School District No. 21 v. Wallowa County*, 142 Pac. 320, 320 (Or. 1914). *Seeck v. Jakel*, 141 Pac. 211 (Or. 1914). But in Oregon this right of re-entry is not assignable and it does not pass with a conveyance of the grantor's property. "Because the grantor may waive his right to insist that the condition subsequent has been broken, his chose in action in the premises is classed as a personal privilege to be asserted only by himself or his heirs. It is not assignable, and, until he actually recovers the land as upon breach of the condition, his deed confers no right upon his subsequent grantee." *School District No. 21 v. Wallowa County*, 142 Pac. 320, 320 (Or. 1914). *Wagner v. Wallowa County*, 148 Pac. 1140 (Or. 1915); *Magness v. Kerr*, 254 Pac. 1012, 1014 (1927). This rule is obviously fatal to any suggestion that appellants can assert any claim under the right-of-way deed. As a matter of fact it seems unlikely that at this late date Peninsula Industrial Company itself could claim a violation of the condition (see *Booth v. County of Los Angeles*, 124 Cal. App. 259 (1932)), particularly if, as appellants contend, Peninsula Industrial Company has transferred its interest in the district property. In Oregon that transfer is itself a waiver of the right of re-entry. See *Wagner v. Wallowa County*, 148 Pac. 1140, 1144 (Or. 1915).

For these reasons it seems clear there has been no violation of the deed provisions and even if such a violation

existed appellants could make nothing of it.

Appellants, having no property interest in Denver Avenue and, for the reasons indicated, no rights under the right-of-way deed, argue that the construction of the underpass was a violation of 123 O.C.L.A. 216 (4 O.R.S. 551.140). That section reads:

"REALIGNMENT OF DIKES BY LANDOWNERS: PROCEDURE; EXPENSE: OWNERSHIP OF NEW DIKE. Any person through whose lands dikes shall have been constructed under this act may be allowed to construct a dike upon new lines between any two points on the original line. In such case the owner shall file application with the county court, giving a plat of the proposed change, and indorsed by the superintendent of the district. If the court is satisfied that the change is not detrimental to the district, the application shall be granted. The applicant shall construct the new dike at his own expense, and up to the standard of the original, of which fact the superintendent shall be the judge. The dike thus constructed shall become the property of the district in the same manner as the original, and subject to the same regulation, and the right of way of the original dike thereon becomes vacated."

Obviously this provision has nothing whatever to do with this case. The statute relates only to dikes "constructed under this act", that is, under the provisions of the Oregon law authorizing the construction of dikes by irrigation and drainage districts. Denver Avenue was not constructed as a dike; it was not constructed by an irrigation or drainage

district; and it was not, therefore, constructed under the provisions of "this act". Section 216 relates, moreover, only to dikes belonging to an irrigation or drainage district. It provides that upon realignment the new dike shall belong to the district "in the same manner as the original". Denver Avenue did not, of course, belong to District No. 2. Finally, there is nothing in the statute to suggest that even if it were violated the consequence would be that appellants would be entitled to recover their flood losses from the United States. As appellants point out, the court below did not comment on this statute—for the very good reason, no doubt, that it seems self-evident the statute has nothing to do with this case.

Appellants argue that they or District No. 2 "adopted" the Denver Avenue fill for flood protection purposes. Nothing in the record supports that argument. The Denver Avenue right-of-way lies outside and beyond the boundaries of District No. 2 (R. 305); the Dater report says specifically that Denver Avenue is not a dike (R. 335); the proceedings for the revision of the plan of reclamation carefully distinguish between Denver Avenue and the district levees (Exs. 72, 73, 74); and there is no proof whatever that appellants individually placed any reliance on the Denver Avenue fill. No one of the appellants objected to the construction of the underpass or claimed any violation of his rights on that account (R. 83).

But even if this were wrong, if the district or appellants

had hoped or expected that Denver Avenue would provide flood protection if the occasion arose, it would make no difference. Appellants by living behind the Denver Avenue fill, hoping, believing or expecting, that it would act as a dike did not thereby obligate the owners of Denver Avenue to maintain the fill as a levee. This is both self-evident and well settled. "The fact that a land owner avails himself of the right to repel vagrant waters of a river by embankments does not, in the absence of some further circumstances or set of circumstances, impose upon him any obligation to maintain such obstruction, or to refrain from restoring natural conditions." *The Weinberg Co. v. Bixby*, 185 Cal. 87, 101, 196 Pac. 25 (1921). "But it is inconsistent with any sense of fairness or logic to assume that a landowner must by the maintenance of an artificial embankment protect his neighbor below from waters of any character which otherwise would flow upon the lower proprietor's estate." *Vollrath v. Wabash R. Co.*, 65 F. Supp. 766, 772 (D.C. Mo. 1946). "The only basis upon which plaintiff could rightfully claim injury for this action would be on the theory that the spillway, having once been set at a higher elevation and with a narrower outlet, gave plaintiff a vested right in having it maintained in that original condition. We believe this position is untenable." *Ireland v. Henrylyn Irr. Dist.*, 160 P. 2d 364, 365 (Colo. 1945). See also *Whitcher v. State*, 181 A. 549, 552 (N.H. 1935); *Branch v. City of Altus*, 159 P. 2d 1021

(Okla. 1945); *Savoie v. Town of Bourbonnais*, 90 N.E. 2d 645 (Ill. App. 1950). This must be so. Surely no court can be expected to hold that a landowner, merely by hoping or expecting that his neighbors will provide him with flood protection, can obligate his neighbors to do so.

This is particularly clear under the circumstances of this case. The paramount right in Denver Avenue, the right that transcends every other claim on the property, is the right of the public to safe travel. This means that even if Denver Avenue could be said to have some secondary or incidental levee purposes, those purposes would have to yield to the paramount right of the public to travel in safety. The authorities are clear and unequivocal. "The streets belong to the public and are primarily for the use of the public in the ordinary way." *Packard v. Banton*, 264 U.S. 140, 44 S. Ct. 257, 259 (1924). "Streets and highways are dedicated, secured and maintained primarily for public transit, and must be so preserved. All other uses thereof must be subordinated or yield to the right of free and unobstructed passage." *Hanson v. Hall*, 279 N.W. 227, 229 (Minn. 1938). "By the location of highways and other public ways the public acquire 'a right of passage for the purpose of travel over the land taken with all the powers and privileges necessarily implied as incidental to the exercise of that right.'" *City of Boston v. A. W. Perry, Inc.*, 22 N.E. 2d 627, 629 (Mass. 1939). "Public highways are created and dedicated to public use for the purpose of

handling necessary traffic thereon and the legislature has plenary power over the regulation thereof including the right to prohibit parking thereon altogether or to place such restrictions upon the same as it deems for the safety and best interests of the public." *Kelly v. Anderson*, 249 P. 2d 833, 835 (Ariz. 1952). "That the public is entitled to a proper viatic use of a highway is too well established to need argument or citation of authority." *Furlong v. Deringer*, 13 A. 2d 186, 187 (Vt. 1940). See also: *State v. Gamelin*, 13 A. 2d 204 (Vt. 1940); *State v. F. W. Fitch Co.*, 17 N.W. 2d 380 (Ia. 1945); *Wolfe v. City of Providence*, 74 A. 2d 843 (R. I. 1950); *Hildebrand v. Southern Bell Telephone & Tel. Co.*, 14 S.E. 2d 252 (N.C. 1941); *Foster's Inc. v. Boise City*, 118 P. 2d 721 (Idaho 1941). The rights of the public extend to the entire highway structure, not merely the traveled portion. See *Simpson v. Adkins*, 53 N.E. 2d 979, 984 (Ill. 1944); *Miller v. Pennsylvania-Reading Seashore Lines*, 198 A. 848, 850 (N.J. 1938); *Otten v. Big Lake Ice Co.*, 270 N.W. 133, 135 (Minn. 1936).

The right of travel thus vested in the public is the right to travel in reasonable safety. "It [the right of passage] also includes the right to a reasonably safe passage, which may be enforced through the police power even though the abutting owners' rights be diminished thereby." *Breinig v. County of Allegheny*, 2 A. 2d 842, 847 (Pa. 1938). "The right to use the highways and streets for purposes of travel, however, is not an absolute and unqualified one, but may

be limited and controlled by the state in the exercise of its police power, whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people, and is subject to such reasonable and impartial regulations adopted pursuant to this power as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement, and to provide for their safety while using it." *State v. Karel*, 180 So. 3, 6 (Fla. 1938). "The state may prescribe regulations adapted to conserve its highways as to cost of construction and maintenance, to reasonably restrict their use in favor of normal traffic, and to promote the safety of all who may use them." *State v. John P. Nutt Co.*, 185 S.E. 25, 29 (S.C. 1935). See to the same effect *In Re Opinion of the Justices*, 8 N.E. 2d 179 (Mass. 1937); *Joyner v. Matthews*, 68 S.E. 2d 127 (Va. 1951).

This public right to safe travel is the paramount consideration and the rights of all others, including the abutting property owners, must yield to it. "While the county's right of way is an easement, neither the owners of adjoining land nor plaintiff may use the highway for any purpose inconsistent with the right of the public to its full and free enjoyment as such. Such rights as plaintiff and adjoining land owners may have are subordinate to, and must yield to the public use." *Airways Water Co. v. Los Angeles County*, 236 P. 2d 199, 200 (Cal. App. 1951). "It is settled that the rights of abutting property owners are subservient

to the rights of the public in the full enjoyment of its public ways." *Levy v. Curlin*, 241 S.W. 2d 997, 999 (Ky. App. 1951). "This use [by the lessee of adjoining property] could have been abated if inconsistent with the full enjoyment of the right of way by the public." *Carlton v. Pacific Coast Gasoline Co.*, 242 P. 2d 391, 395 (Cal. App. 1952). "But this right [of the abutting owner] must be exercised subject to the protection of the public which may be using the highway or sidewalk, and it may be regulated under the police power in the interest of safety." *Breinig v. County of Allegheny*, 2 A. 2d 842, 847 (Pa. 1938). Indeed, any use of the highway properties inconsistent with legitimate highway purposes is a nuisance and may be abated as such. See *People v. Henderson*, 194 P. 2d 91 (Cal. App. 1948); *Scott v. Reynolds*, 29 S.E. 2d 88 (Ga. App. 1944); *Southeastern Pipe Line Co. v. Garrett*, 16 S.E. 2d 753 (Ga. 1941); *Carson v. Baldwin*, 144 S.W. 2d 134 (Mo. 1940). Thus appellants must argue not only that their silent hope that Denver Avenue would serve as a flood protection structure obligated Oregon to maintain it as such but also that the obligation thus created transcended the paramount right of the public to safe travel. This is to claim a great deal for an expectation never voiced by appellants, never accepted or recognized by anyone.

4. The Denver Avenue underpass was not constructed or maintained by the United States or its employees.

Jurisdiction to hear these claims depends entirely upon

the Tort Claims Act, 28 U.S.C.A. 1346(b). That jurisdiction is limited to claims for loss of property "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *". "Employee of the Government" is defined by 28 U.S.C.A. 2671 to include employees of Federal agencies and "Federal agency" is defined to include the ordinary departments of the Government, but not, by express provision, "any contractor with the United States."* There neither is nor could be any claim in this case that employees of the United States constructed the Denver Avenue underpass. That work was done by Tower Sales & Erecting Company, a subcontractor of Kaiser Company, Inc. (R. 49, 259) pursuant to plans furnished by and under the supervision of the Oregon State Highway Commission (R. 49). The permit for the construction of the underpass runs from the Oregon State Highway Commission to F.P.H.A. (R. 293) and F.P.H.A. approved the subcontract between Kaiser and Tower (R. 281). But no one could claim that the issuance of the permit or the execution of the contract damaged anyone. The alleged wrong is the interruption of the fill by

*The Tort Act adopts the *respondiat superior* theory of liability. *National Mfg. Co. v. United States*, 210 F. 2d 263, 278 (C.A. 8 1954); *Christian v. United States*, 184 F. 2d 523 (C.A. 6 1950); *King v. United States*, 178 F. 2d 320 (C.A. 5 1949). It is not to be expected, therefore, that the United States would consent to become liable for the negligence of the employees of government contractors. The common law has always recognized that a master cannot be held for the negligence of the employees of independent contractors.

the actual construction of the underpass. That wrong, if it was one, was not committed by the employees of the United States and by express provision of the statute there is no Tort Act jurisdiction to consider claims based upon wrongs done by Government contractors. This must mean that the court below had no jurisdiction to consider these claims.

5. There was no negligence or wrongful conduct in connection with the construction and maintenance of the ring levee.

Two things are fundamental in considering the ring levee and its construction: first, that absent failure or overtopping of one of the primary (river front) levees no water could reach Denver Avenue or the ring levee; and, second, that no one foresaw and in the exercise of due care no one could foresee a failure of the primary levees. This was the fundamental finding of the District Court in the Vanport cases (109 F. Supp. 213,227) and it was a fundamental conclusion of this Court on the appeal of those cases. "Much evidence was to the effect that the sudden failure of an embankment of the size, age, and past performance of the western embankment was both unprecedented and unforeseeable." (218 F. 2d 446, 451). There is nothing to the contrary in this record. All the witnesses agree that no failure of the western embankment was or could have been foreseen (R. 219, 224, 237, 414, 423) and the court below so found.

"9. The flood water which inundated plaintiffs' property approached Denver Avenue and the ring levee from the west. In the exercise of due care, there was

no reason to anticipate a failure of the western embankment or any embankment of District No. 1, and hence no reason to anticipate that flood waters would ever approach Denver Avenue and the ring levee from the west. No one contemplated Denver Avenue as a bulwark against a weight of water such as was cast against it when the western embankment at District No. 1 broke. The failure of the ring levee and the inundation of the plaintiffs' property resulted from a set of circumstances unforeseen by anyone, including plaintiffs, and which in the exercise of due care could not have been foreseen." (R. 143-4)

In the absence of any reason to anticipate a failure of one of the primary levees, due care and good engineering practice did not require the construction of the ring levee or any secondary levee whatever at the site of the underpass (R. 224-5, 238). The Corps of Engineers, which is responsible for most of the levee work in the United States, does not build secondary levees (R. 223, 237). The Corps takes the good sense position that the available funds should be spent not on secondary levees but on raising and strengthening the primary levees (R. 223, 237). The consequence is that secondary levees are rarely, if ever, built and there are no standards of design available for them (R. 223, 237). Appellants' expert witnesses did not say that due care and good engineering practice require the construction of secondary levees; nor did they undertake to provide standards to which such levees should be built. How can the Court be asked to say that this particular secondary levee was neg-

ligently constructed when the engineering profession does not build secondary levees and has no standards for their construction?

Just why the ring levee was built no one knows, but a reasonable guess can be made. The levees at District No. 2, at their lowest elevation, were 1.7 feet below the levees of District No. 1 (R. 44). This meant that a flood might conceivably overtop the District No. 2 levees at a time when the levees of District No. 1 were still above flood elevation (R. 225, 239). In that event, if the Denver Avenue underpass was unprotected, water from District No. 2 could flow into and flood District No. 1. It was apparently against this very remote possibility and in the exercise of what was truly a superabundance of caution that the ring levee was constructed by the Vanport contractors (R. 226, 239). The Government experts testified this was a reasonable thing to do (R. 225, 239). There is no contrary testimony.

In any event and for whatever reason the ring levee was built during March and April 1943 by the contractors who worked on the Denver Avenue underpass and particularly by Berke Bros. Construction Company (R. 50). In the fall of 1943, George H. Buckler, one of the Vanport contractors, made arrangements with Fred Christensen, a Portland contractor, to raise the elevation of the ring levee, to widen its top to 12 feet, and to lay a clay blanket on its eastern or outside slope (R. 51). This work was done by Mr. Christensen in August and September 1943 in accordance with plans

furnished by Kaiser Company, Inc. (R. 51, 296, 301). In the spring of 1944 employees of the Housing Authority of Portland, the lessee of Vanport and East Vanport, discovered cracks and sloughs in portions of the ring levee (R. 54). Later that year the Housing Authority employees repaired the levee by capping the crown, reworking the areas where sloughs had occurred, and filling in the cracks (R. 54). This work was apparently done in a satisfactory manner for no further sloughs or cracks developed (R. 418) and no further settlement took place prior to the 1948 failure (R. 54-5).

Appellants' brief criticizes these repairs, pointing to testimony that a reconstruction rather than a repair program was considered and rejected (R. 194). But appellants' expert witnesses offered no criticism of the repair work; the Government experts testified that the repairs were adequate to restore the levee to its original condition (R. 227, 242); and the fact is that no further sloughs or cracks developed (R. 418). There is, therefore, firm support in the record for the finding of the court below that "the employees of the Housing Authority of Portland are not shown to have done anything legally significant" (R. 145) and that appellants "have failed to prove any negligence or wrongful conduct on the part of the Housing Authority or its employees" (R. 145).

Appellants are critical of the ring levee because they say it was designed to protect District No. 1 rather than

District No. 2. This criticism, even if it were sound, would have no legal significance since neither the United States nor the Vanport contractors had any obligation to protect appellants from flood damage. But the fact is that the criticism is not justified: first, because no one could or did foresee that flood waters would ever approach District No. 2 from the west; second, because the levee was adequately designed to protect against the only foreseeable risk, the risk that the District No. 2 levees would be overtopped; and third, because the ring levee did in fact provide protection for District No. 2. The ring levee held the flood waters for thirty hours (R. 80-1), time enough for the Oregon Governor to order and carry out the evacuation of District No. 2 (R. 81) and time enough for appellants to remove their personal property from the area (R. 391, 375).

Moreover, from the point of view of structural stability alone the ring levee, as the Government experts testified (R. 228, 243), was in every way comparable in strength with the Denver Avenue fill. When the flood waters reached Denver Avenue the first difficulty that developed was not with the ring levee but with the fill itself and only by heroic efforts was an immediate failure of the fill prevented (R. 184, 210, 217). Considered as structures, therefore, and independent of the fortunes of the flood fight, the ring levee was at least as strong as the Denver Avenue fill. Appellants have nothing to complain about.

Appellants argue that the ring levee appeared to be

better than it was and that by its very existence it lulled appellants into a false sense of security. There is nothing in the record to support this assertion. No witness testified that he was deceived. On the contrary, the features about the ring levee which appellants' experts criticized—that it was built of sand (R. 167), that it was steep (R. 167, 206), that it was circular in shape (R. 168, 206)—were, of course, perfectly apparent to even the most casual observer.

The ring levee failed under pressure of flood water coming from the west. No one could or did foresee that the ring levee would ever be called upon to withstand flood pressure from that direction. As against the only foreseeable risk, the remote possibility of water from the east, the ring levee was entirely adequate (R. 228, 243). How then can it be argued that the ring levee was carelessly constructed? Appellants are asking the Court to find negligence on account of an alleged failure to take precautions against a risk which no one, appellants included, could foresee. The failure to provide against a totally unforeseeable eventuality is not negligence—as the court below concluded and as this Court well knows.

6. The ring levee was not built or maintained by the United States or its employees.

Under the Tort Act the United States is liable only for the negligence or wrongful conduct of its employees acting in the scope of their employment (28 U.S.C.A. 1346(b))

and by express provision of the statute the United States is not liable for the negligence of the employees of "any contractor with the United States" (28 U.S.C.A. 2671). The ring levee was not built by employees of the United States. It was built by employees of the contractors who worked on the Denver Avenue underpass (R. 50) and by Fred Christensen, another Portland contractor (R. 50). This must mean, under the express language of the statute, that the United States cannot be held responsible for any negligence in the design or construction of the levee. So much for construction.

The ring levee was not repaired by employees of the United States. It was repaired by employees of the Housing Authority of Portland, a municipal organization created by resolution of the Portland City Council acting under the authority of the Oregon State Housing Authorities Law (R. 59). The District Court has concluded that the Portland Housing Authority is a Federal agency and that its employees are employees of the United States within the meaning of the Tort Act. The United States emphatically disagrees. The statutes, the cases and the facts (R. 59-76) all make it plain that local housing authorities are not part of the Federal government. The United States so argued to this Court on the appeal of the Vanport cases. In those cases the Court concluded that the no-negligence findings of the trial judge were supported by the evidence and accordingly did not reach the question of the status of the Housing Author-

ity (218 F. 2d 446, 452). In these cases it seems equally clear that the no-negligence findings are supported by the record and presumably, therefore, this Court will again find no occasion to go further. If, however, the Court should reach the question of the status of the Housing Authority, the Government respectfully requests that the Court consider the material set out in Appendix A to this brief. For the reasons there explained the Government is confident that the United States is not responsible for the negligence, if any, of Housing Authority employees.

7. The United States was not obligated to provide flood protection to appellants.

Any failure on the part of the United States to provide a ring levee adequate to protect appellants from flood damage, even if negligent, would be significant only if the United States had some obligation to provide appellants with flood protection. In Oregon, as elsewhere, negligence is actionable only if defendant has a duty to plaintiff. "Actionable negligence must be predicated upon the breach of a legal duty." *Freer v. City of Eugene*, 111 P. 2d 85, 87 (Or. 1941). "A necessary element of actionable negligence is the existence of a duty on the part of defendant to protect the plaintiff from the injury complained of." *Todd v. Pac. Ry & Nav. Co.*, 117 Pac. 300 (Or. 1911). Here no such duty exists. The United States had no obligation by statute, by common law or by contract to protect appellants from flood

waters. The fact that the ring levee was on Government property (R. 58) did not obligate the United States to maintain it with due care or at all for the benefit of appellants. This is plain enough. "The fact that a land owner avails himself of the right to repel vagrant waters of a river by embankments does not, in the absence of some further circumstances or set of circumstances, impose upon him any obligation to maintain such obstruction, or to refrain from restoring natural conditions." *The Weinberg Co. v. Bixby*, 185 Cal. 87, 101, 196 Pac. 25 (1921). See also *Vollrath v. Wabash R. Co.*, 65 F. Supp. 766, 772 (D.C.Mo. 1946); *Ireland v. Henrylyn Irr. Dist.*, 160 P. 2d 364, 365 (Colo. 1945); *Whitcher v. State*, 181 A. 549, 552 (N.H. 1935); *Branch v. City of Altus*, 159 P. 2d 1021 (Okla. 1945); *Savoie v. Town of Bourbonnais*, 90 N.E. 2d 645 (Ill. App. 1950). This rule is the inevitable consequence of the settled doctrine that flood waters are a common enemy against which each landowner is entitled to protect himself as he sees fit and without any obligation to adjoining landowners. For cases recognizing and accepting the common enemy rule see *Mogle v. Moore*, 16 C. 2d 1, 104 P. 2d 785 (1940); *Rex v. Commissioners*, 8 B. & C. 356, 108 Eng. Repr. 1075 (1828); *Cubbins v. Mississippi River Comm'n.*, 241 U.S. 351, 363 (1916); *Southern Pac. Co. v. Proebstel*, 150 P. 2d 81 (Ariz. 1944); *Kraus v. Strong*, 227 P. 2d 93 (Kans. 1951); *Sinclair Prairie Oil Co. v. Fleming*, 225 P. 2d 348 (Okla. 1949); *Bass v. Taylor*, 90 S.W. 2d 811 (Tex. 1936);

Leader v. Matthews, 95 S. W. 2d 1138 (Ark. 1936); *Smeltzer v. Borough of Ford City*, 92 A. 702 (Penn. 1914); *Honey v. Bertig Co.*, 150 S. W. 2d 214 (Ark. 1941); and in Oregon, *Street v. Ringsmyer*, 108 Or. 349, 216 Pac. 1017 (1923); *Morton v. Oregon Short Line Ry. Co.*, 48 Or. 444, 87 Pac. 151 (1906); *Price v. Oregon R. Co.*, 47 Or. 350, 83 Pac. 843 (1906).

These decisions make it clear that the common law puts the burden on each landowner to provide himself with flood protection. In so far as that burden has been shifted by statute it has been shifted not to the United States but to Peninsula Drainage District No. 2. The district was organized, as the original papers point out, for flood protection purposes:

"5. The said district is to be organized for the construction, operation and maintenance of a drainage system and the reclamation of the said lands *and the protection thereof from overflow of the Columbia River and the Columbia Slough*, and the proposed reclamation and protection aforesaid is for both sanitary and agricultural purposes, and will be conducive to the public health and welfare and will be of public utility and benefit." (R. 331-2)

And ever since its organization District No. 2 has had ample power to obtain funds for flood protection and levee work (R. 19).

Nevertheless, during the six years which intervened be-

tween the construction of the underpass and the 1948 flood, District No. 2 and appellants did nothing: nothing to install a stop-log structure within the underpass, nothing to strengthen the ring levee, nothing by way of building a new levee. The court below concluded that under these circumstances the construction of the underpass was not the proximate cause of the damage to plaintiffs. The court found:

"10. Peninsula Drainage District No. 2, in which plaintiffs' property was located, was organized by plaintiffs or their predecessors in interest under the drainage district laws of Oregon in 1917. District No. 2 was endowed with certain sovereign powers and was charged, as was each acre within its boundaries, with the responsibility of erecting adequate works for protecting the district lands from overflow. This duty was continuous and involved repair, maintenance and strengthening of existing walls and structures. District No. 2 at no time contributed to the construction or maintenance of Denver Avenue, and during the entire period of approximately six years between the time when the Denver Avenue underpass and ring levee were constructed and the time of the 1948 flood, District No. 2 did nothing with respect to Denver Avenue, the underpass or the ring levee. District No. 2 and not the United States had the duty of providing flood protection for lands within the district. District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands. The construction of the underpass and the failure to provide an unbreakable ring levee was not the cause, proximate or otherwise, of any damage to plaintiffs." (R. 144).

The suggestion that appellants were unable to provide themselves with flood protection because the United States had condemned the land around the Denver Avenue underpass cannot be defended. Appellants could, no doubt, readily have obtained permission from the Highway Commission to install a stop-log structure in the underpass or from the Housing Authority to strengthen the ring levee itself if they had desired to do so. And in any event appellants were obviously in a position to build such levees as they thought appropriate on their own property or on district lands east of the ring levee. Appellants cannot condemn as impossible what was never attempted or requested.

The United States had no obligation to protect appellants from flood damage and it did nothing to prevent appellants from protecting themselves.

8. These cases relate to discretionary activity as to which there can be no liability under the Tort Act.

The decision of the Supreme Court in *Dalehite v. United States*, 346 U.S. 15, 35 (1953), settles the debate as to the meaning of the discretionary activity exemption in the Tort Act (28 U.S.C.A. 2680(a)). Mr. Justice Reed said:

"It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifi-

cations or schedules of operations. *Where there is room for policy judgment and decision there is discretion.*" (Emphasis supplied).

To illustrate, the court cited with approval a number of decisions which involved claims for water damage. In *Coates v. United States*, 181 F. 2d 816 (C.A. 8 1950), employees of the United States were said to have been negligent in constructing and operating Mississippi flood control works. On the basis of the discretionary activity exception the complaint was dismissed and the Court of Appeals held properly so. In *Olson v. United States*, 93 F. Supp. 150 (D.C. N. D. 1950), in *Lauterbach v. United States*, 95 F. Supp. 479 (D.C. Wash. 1951), and in *North v. United States*, 94 F. Supp. 824 (D.C. Utah 1950), the claims were founded upon alleged negligence of Government employees in the operation of a Government dam and in each instance it was held that there was no jurisdiction because of the discretionary activity exemption. *Boyce v. United States*, 93 F. Supp. 866 (D.C. Ia. 1950), another decision cited with approval by Mr. Justice Reed, was a case in which the employees of the Corps of Engineers working on Mississippi navigation problems damaged plaintiff's property by blasting operations alleged to be negligent. Since the blasting was pursuant to plans and specifications approved by the Chief of Engineers it was held that there could be no recovery.

These cases would seem to control this case in all its

aspects. The decision to build or not to build the Denver Avenue underpass inevitably called for the exercise of "policy judgment"; and as far as the ring levee is concerned appellants' experts readily agreed that the determination of the proper design and construction of levees calls for an exercise of judgment (R. 169)—and therefore for an exercise of discretion.

The precise question, however, is not so broad. For the United States did not build the underpass or the ring levee. The United States did three things: it decided to arrange for the construction of Vanport, it acquiesced in the decision of the Highway Commission and the Vanport contractors to build the underpass, and it acquiesced in the subsequent decision of the contractors to build the ring levee. Surely these decisions called for the exercise of "policy judgment". They were in fact policy decisions and nothing more. If the discretionary activity exception of the statute means anything at all it means that policy decisions cannot be the subject of Tort Act claims. And all the cases so hold. See *Dalehite v. United States*, 346 U.S. 15 (1953); *Coates v. United States*, 181 F. 2d 816 (C.A. 8 1950); *Smart v. United States*, 207 F. 2d 841 (C.A. 10 1953); *Chournos v. United States*, 193 F. 2d 321 (C.A. 10 1952); *Harris v. United States*, 205 F. 2d 765 (C.A. 10 1953).

9. These claims are barred by 33 U.S.C.A. 702(c).

33 U.S.C.A. 702(c) provides:

“No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *”

This Court in the Vanport cases (218 F. 2d 446, 452) concluded that this provision had not been repealed by the Tort Act, that it was applicable in the Columbia River Basin and that it was effective to bar the claims of the Vanport residents. The Court said:

“The provision of 33 U.S.C.A. § 702c barring liability ‘from or by floods or flood waters’ expresses a policy that any federal aid to the local authorities in charge of flood control shall be conditioned upon federal non-liability. To base recovery here on any act or omission of the Engineers in assisting in the fight against this flood would run counter to the policy thus expressed. See *National Mfg. Co. v. United States*, 8 Cir., 1954, 210 F. 2d 263, 270-275, certiorari denied, 347 U.S. 967, 74 S. Ct. 778.”

As far as federal aid is concerned, the situation at District No. 2 is identical with that at District No. 1 where Vanport was located. Both districts received extensive and almost identical assistance from the United States in rebuilding the district levees (R. 19-22, 32-5). This must mean, under the authority of the decision by this Court in the Vanport cases, that these claims are barred by section 702(c). The no liability provision of that section is unconditioned and unequivocal. It was adopted by Congress immediately after the 1927 Mississippi River flood, the flood of record on the river, a flood which resulted in tremendous

property damage. The purpose of the statute, it seems plain enough, was to make it clear that the United States, for reasons which Congress found good and sufficient, was not to be held responsible for flood loss—whatever the occasion and whenever and however it took place. (See Appendix B for the history of the statute). If the Vanport residents (*Clark v. United States*, 218 F. 2d 446 (C.A. 9 1954)) and the residents of Kansas City (*National Mfg. Co. v. United States*, 210 F. 2d 263 (C.A. 8 1954)) are precluded by section 702(c) from asserting flood damage claims against the United States, it is difficult to see why these appellants are not similarly foreclosed.

10. Since the events of which appellants complain took place prior to January 1, 1945 the court below had no jurisdiction to consider their claims.

The Tort Act confers jurisdiction on the District Court to consider "claims against the United States, for money damages, accruing on and after January 1, 1945 . . ." 28 U.S.C.A. 1346(b). The events of which appellants complain all took place and their cause of action, if any, accrued prior to January 1, 1945; accordingly the Tort Act confers no jurisdiction to hear these cases. The work on the Denver Avenue underpass was completed in February or March 1943 (R. 50). The construction of the ring levee, beginning in February, was completed in April 1943 (R. 50). During August and September 1943 the levee was raised and a clay blanket installed on its eastern slope (R. 51). The

repair work on the levee by employees of the Housing Authority of Portland was completed in the summer or fall of 1944 (R. 54) and there was no change thereafter until the failure (R. 54-5). Thus all the events now under discussion took place prior to January 1, 1945.

There has been some debate in the cases as to when the statute of limitations begins to run on a claim for water damage as a result of construction activity. The uncertainty, however, is to be found almost entirely in decisions having to do with flood damage under circumstances in which the construction itself was not claimed to be wrongful and the possibility of damage was not apparent until the flood occurred. Here the situation is quite different. Appellants are contending that the initial construction of the Denver Avenue underpass constituted a trespass and breach of contract in violation of their rights. The cause of action for that alleged wrong must have arisen no later than when the construction of the underpass was completed in the spring of 1943—and thus too early for Tort Act jurisdiction. “Where the injury or trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is suffered or the trespass committed.” *Rankin v. DeBare*, 271 Pac. 1050, 1051 (Cal. 1928). This rule recognizing that the right of action, if any, arising from the construction of a permanent structure accrues when the structure is completed has been applied in a great variety of circumstances:

in connection with the construction of highway grades (*Monarch Refrigerating Co. v. City of Chicago*, 66 N.E. 2d 692 (Ill. App. 1946); *Horner v. Winnebago County*, 74 N.E. 2d 728 (Ill. App. 1947); *Gillam v. City of Centralia*, 128 P. 2d 661 (Wash. 1942)), in connection with the construction of railroads and railroad fills (*Vanton Corporation v. New York Rapid Transit Corp.*, 13 N.E. 2d 593 (N.Y. 1938); *Norfolk & W. Ry. Co. v. Little*, 120 S.W. 2d 150 (Ky. App. 1938)); in connection with the construction of sewage plants and spraying systems (*Jeakins v. City of El Dorado*, 53 P. 2d 798 (Kans. 1936); *Kent v. City of Trenton*, 48 S.W. 2d 571 (Miss. App. 1931); *Kentucky & West Virginia Power Co. v. McIntosh*, 129 S.W. 2d 522 (Ky. App. 1939)); in connection with pipelines (*Magnolia Pipe Line Co. v. Polk*, 90 P. 2d 1076 (Okla. 1939)), a coal chute (*Missouri Pac. R. Co. v. Davis*, 53 S.W. 2d 851 (Ark. 1932)) and the removal of a balcony (*Pappas v. Braithwaite*, 162 P. 2d 212 (Mont. 1945)); and in connection with the construction of culverts, drains and dams (*Louisville & N. R. Co. v. Laswell*, 187 S.W. 2d 732 (Ky. App. 1945); *Stillwell v. City of Fort Worth*, 169 S.W. 2d 486 (Tex. App. 1943); *Tate v. Western Carolina Power Co.*, 53 S.E. 2d 88 (N.C. 1949); *Webb v. Union Electric Co. of Missouri*, 223 S.W. 2d 13 (Mo. App. 1949); *Fitzhugh v. Louisville & N. R. Co.*, 189 S.W. 2d 592 (Ky. App. 1945)).

There is no reason whatever why appellants, if they believed the construction of the Denver Avenue underpass

was an invasion of their rights, could not have moved promptly to protect those rights. In any event, since these claims depend in every aspect on 1943 activity, the Tort Act confers no jurisdiction to hear them.

11. Appellants assumed the risk of flood loss.

Each of the appellants is a property owner in District No. 2 (R. 82). The property of some of the appellants is located between Denver Avenue and Union Avenue (R. 55-6, 82); the property of others is located east of Union Avenue (R. 82). The immediate cause of damage to property east of Union Avenue was not the failure of the ring levee; it was the failure of the Union Avenue fill (R. 81). There is in the record no testimony concerning the Union Avenue failure, no basis upon which the United States could be held responsible for that failure. It is difficult to see, therefore, how property owners east of Union Avenue could have any possible claim against the Government.

Moreover, each of these appellants, like everyone else, had an obligation to protect himself from flood damage. "The law imposes upon a person sui juris the obligation to use ordinary care for his own protection, the degree of which is commensurate with the danger to be avoided." *Carroll v. Grande Ronde Electric Co.*, 84 Pac. 389, 394 (Or. 1906). *Morris v. Fitzwater*, 210 P. 2d 104 (Or. 1949). Yet for six years no one of the appellants did anything whatever to protect himself from the hazard now alleged to have

been created by the construction of the underpass. This means appellants assumed the risk.

Appellants not only did nothing to protect themselves but most if not all of them either acquired or substantially improved their properties after the underpass and the ring levee had been constructed (R. 82-3). Four District No. 2 landowners testified at the trial. One of these Mearl C. Tillman, said that he acquired his District No. 2 property in May 1945 (R. 162); obviously Mr. Tillman assumed whatever risks resulted from the 1942-3 construction of the underpass and the ring levee. Donovan C. Byers, another appellant, acquired his District No. 2 property in 1938 at a cost of \$2,930 (R. 351). His total investment is now \$20,000 (R. 351), a major portion of which was invested subsequent to 1942 (R. 351). John Francis Kernan, another appellant, acquired property in District No. 2 as early as 1932 (R. 384) but he too improved his property subsequent to 1942 (R. 384). Ivan F. Phipps, another appellant, testified that he had an investment in District No. 2 of more than \$100,000 and that most of that investment was made subsequent to the construction of the ring levee and the Denver Avenue underpass (R. 401, 402, 403, 406).

What the situation of the other appellants may be, this record does not show. Presumably it would not be greatly different from that of the appellants whose testimony appears in the case. Surely those appellants who acquired or improved their properties subsequent to the construction of

the underpass and ring levee accepted the situation as they found it and assumed whatever risks might be incident thereto.

12. Nothing in appellants' brief justifies a decision in their favor.

The brief filed by appellants is largely an attack on the findings of the trial court, an attack based on many erroneous assumptions of fact, some of which are noted below.* The

*Appellants assert, for example, "that the United States, acting through F.P.H.A., wrongfully, unlawfully, negligently and deliberately cut an underpass through" Denver Avenue (p. 2); it is stipulated, however, that the underpass was built by the Vanport contractors under the supervision of the Highway Commission (R. 49-50). Appellants say that the liability of the United States to appellants for flood damage "was identical in every case" (p. 2); obviously, however, those appellants with property east of Union Avenue and those appellants who acquired their property subsequent to 1942 are in a special position. Appellants say that under the right-of-way deed Multnomah County was obligated to "maintain an unbroken embankment across" the right-of-way (p. 5); the fact is that the right-of-way deed says nothing whatever about "an unbroken embankment"—on the contrary, it provides for highway crossings, railroad crossings, pipes, conduits and two deep water channels through the embankment (R. 458-9). Appellants say that under the right-of-way deed Peninsula Industrial Company "retained the ownership of the embankment outside the 80 foot strip" (p. 5); but the record shows that the fill belonged in its entirety to Multnomah County and to the State of Oregon as its successor (R. 28). The fact that the fill extended beyond the right-of-way does not affect its ownership by Oregon. The deed itself provided that this might be done (R. 457) and in any event the adjoining property owner is the United States. Appellants say that the permit to construct the Denver Avenue underpass was a contract whereby F.P.H.A. agreed to pay for the upkeep of the underpass (p. 10); appellants neglect to point out, however, that by the provisions of the permit the underpass was to be maintained not by the United States but by Oregon (R. 295). Appellants argue that the permit shows that the underpass was a private road (p. 10); there is nothing in the permit to say so—on the contrary, the permit recognizes that the underpass will be used by the public, by "thousands of people" (R. 293). Appellants say that "F.P.H.A. undertook to maintain the ring dike" (p. 12); the fact is that the ring levee was maintained by the Housing Authority of Port-

most important findings have been reviewed in this brief. That review demonstrates, the Government believes, that the findings have abundant record support. Certainly the criticisms made by appellants are unjustified. Appellants complain, for example, of the finding that District No. 2 looked to the levees of District No. 1 for protection from the west (p. 37). But this finding is not only in accordance with the obvious fact; it has full record support. The stipulated pre-trial order, describing the levees of District No. 1, begins by saying: "West of the highway fill supporting Denver Avenue lies Peninsula Drainage District No. 1. The levees of that district provide protection for Peninsula Drainage District No. 2 in the sense that in the absence of a failure of one or more of those levees flood waters cannot

land (R. 53-4). Appellants assert that the alleged "defects" in the ring dike "were hidden and concealed and not apparent to the layman's eye" (p. 14); but, according to appellants' witnesses, **the defects of the ring** levee were the material from which it was made, its slopes and the fact that it was circular in construction (R. 167-8). These facts, obviously, were perfectly apparent to anyone. Appellants suggest that until the District No. 1 levees were constructed Denver Avenue was the western dike for District No. 2 (p. 41); this is in error. The levees for these two districts were constructed more or less at the same time (R. 17, 30-1) and in the early days the Denver Avenue fill could not conceivably have acted as a levee because during that period it was **pierced at ground level by a** five foot open culvert (R. 53). Appellants say that no evidence was introduced in the case "by any one having knowledge of the railway fills as to whether a breakage there might be anticipated" (p. 54). The fact is that witnesses both for appellants and appellee testified that there was no reason to expect a failure of any of the river front levees, including the railway fills (R. 219, 224, 237, 414, 423). Appellants assert that "So far as the F.P.H.A. was concerned no notice whatever was given to District No. 2 or either district of any intention to cut any such underpass, nor any opportunity for them to object" (p. 64); but the Oregon State Highway Commission promptly notified both districts of the proposal to build the Denver Avenue underpass (R. 285, 251, 339).

approach Peninsula Drainage District No. 2 from the west” (R. 29-30). Moreover, the Dater report to the supervisors of District No. 2 specifically called attention to the same fact, namely, that the levees of District No. 1 protect District No. 2 on the west (R. 335).

Appellants complain of the finding that the Denver Avenue fill was not designed as a flood protection structure to withstand high water (p. 49). The finding is entirely correct. Denver Avenue was built not for flood protection but for highway purposes (R. 22) and absent a failure of the river front levees, which no one anticipated, no water would reach it (R. 29-30). Appellants argue that the court improperly found that no one anticipated a failure of the western embankment at District No. 1 (p. 53). But this finding is supported by all the evidence in this case (R. 219, 224, 237, 414, 423), by all the evidence in the Vanport cases (109 F. Supp. 213, 227) and by the decision of this Court on the appeal of those cases (218 F. 2d 446, 451). Appellants say that the court improperly concluded that District No. 2 made no effort to strengthen the Denver Avenue embankment (p. 56). This is precisely true. District No. 2 at no time made any effort to strengthen the Denver Avenue fill or the ring levee. Appellants say that the court improperly concluded that “this is a case of afterthought, not forethought, on the part of plaintiffs in District No. 2” (p. 62). The trial court was indisputably right. No one of the appellants ever complained to the United

States about the underpass or the ring levee until after the flood (R. 83). Appellants say that the court improperly found that no protest against the construction of the underpass was made by District No. 2 (p. 63). Here again the finding is precisely correct. The only protest, such as it was, came from District No. 1 (R. 286).

The list of instances in which the court below was correct and appellants are in error could be extended at some length. It would demonstrate, however, only what is no doubt already apparent: that the findings have full support in the record.

Conclusion

Appellants seek a large judgment on account of an alleged wrong—the construction of the Denver Avenue underpass—which, when it occurred, they accepted in complete silence. Appellants no doubt then recognized what they have since decided to ignore: that Denver Avenue is a highway and that the construction of the underpass was a legitimate highway measure necessary for the safety of the traveling public, a measure fully considered, authorized and approved by the Oregon State Highway Commission, the agency which under Oregon law had charge of Denver Avenue. This must mean that the construction of the Denver Avenue underpass was not wrongful. Certainly it was not wrongful to appellants who have no interest in, no claim

upon Denver Avenue or the fill supporting it. The case for appellants fails before it begins.

The judgment should be affirmed.

Dated June 13, 1955.

Respectfully submitted,

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APPENDIX A

THE UNITED STATES CANNOT BE HELD LIABLE FOR THE NEGLIGENCE OF EMPLOYEES OF THE HOUSING AUTHORITY OF PORTLAND.

To prove a case under the Tort Act, a plaintiff must demonstrate a negligent or wrongful act or omission "of any employee of the Government while acting within the scope of his office or employment * * *" 28 U.S.C.A. 1346(b). Within the meaning of this section " 'Employee of the government' includes officers or employees of any federal agency * * *" 28 U.S.C.A. 2671. " 'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States." 28 U.S.C.A. 2671. The Court below concluded that the Housing Authority was, in effect, project manager for the United States at Vanport, and therefore a federal agency. The United States disagrees.

The Housing Authority, created by the Portland City Council acting under the Oregon State Housing Authorities Law (R. 59), is a quasi-municipal corporation and an agency of Oregon. See *Wickman v. Housing Authority of Portland*, 247 P.2d 630 (Or. 1952).^{*} Since it was first

^{*}For other decisions to the same effect see *Brammer v. Housing Authority of Birmingham District*, 195 So. 256 (Ala. 1940); *Denard v. Housing Authority of Ft. Smith*, 159 S.W. 2d 764 (Ark. 1942); *Kleiber*

created, HAP has owned and operated a 400-dwelling unit, low-rent project located in Portland known as Columbia Villa (R. 61). It has also leased from the United States some fifteen war housing projects (R. 63-64) including Vanport and East Vanport. HAP's interest in these projects depends entirely upon a formal agreement of lease (Ex. 40) by the terms of which the financial risk of the operation is on the United States (Ex. 40). This financial arrangement does not mean that agreement is any less a lease. Compare *Ault Wooden-Ware Co. v. Baker*, 58 N.E. 265 (Ind. App. 1900); *Van Avery v. Platte Valley Land & Inv. Co.*, 275 N.W. 288 (Neb. 1937); *In re Owl Drug Co.*, 12 F. Supp. 439 (D.C. Nev. 1935); 170 A.L.R. 1113. In Oregon, "there are three essential elements of a lease, namely, description of the property, duration of term, and rental consideration." *Young v. Neill*, 220 P.2d 89, 91 (Or. 1950); *Beran v. Templeman*, 26 P.2d 775, 778 (Or. 1933). The HAP lease meets and more than meets these requirements.

The argument that HAP is a federal agency and not, as it appears to be, an agency of Oregon leasing property from the United States, depends to a large extent on certain

v. Newton, 101 P. 2d 21 (Colo. 1940); *Edwards v. Housing Authority of City of Muncie*, 19 N.E. 2d 741 (Ind. 1939); *Spahn v. Stewart*, 103 S.W. 2d 651 (Ky. 1937); *State ex rel. Portrie v. Housing Authority of New Orleans*, 182 So. 725 (La. 1938); *Laret Inv. Co. v. Dickmann*, 134 S.W. 2d 65 (Mo. 1939); *State ex rel. Great Falls Housing Authority v. City of Great Falls*, 100 P. 2d 915 (Mont. 1940); *Lennox v. Housing Authority of City of Omaha*, 290 N.W. 451 (Neb. 1940); and *Wells v. Housing Authority of City of Wilmington*, 197 S.E. 693 (N.C. 1938).

releases issuing from the Federal Public Housing Authority in Washington and addressed to such local housing authorities as HAP. These releases are part of a so-called Manual of Policy and Procedure created by FPHA early in 1942 (R. 69). The Manual is designed (a) to express FPHA policy and requirements on subjects which, under the lease agreements, are for FPHA decision or approval; (b) to express the views of FPHA on subjects which are for decision by the local housing authorities but which involve the fundamental policy of the housing program; and (c) to provide information which may be of use to the local authorities (R. 70). The Manual is prepared in loose-leaf fashion (R. 70). From time to time FPHA distributes new mimeographed releases to be inserted in the Manual (R. 70). These releases are general in terms in the sense that they are not directed to any particular person or any particular housing authority (R. 70). The subjects covered by the releases are as follows: (a) budget and expense, including accounting; (b) care of and accountability for government property, including property in a terminated or stand-by status and including the disposition of such property; (c) selection of tenants and rental arrangements; (d) rental rates; (e) community services; (f) commercial operations on the projects; and (g) reports (R. 71). The Manual relates to all housing operations in which FPHA has an interest, including both low rent and war housing (R. 71). As of any given date, therefore, all the releases in the Manual

are not applicable to any particular project (R. 71). On May 30, 1948, there were approximately 125 releases in the Manual relating to projects such as Vanport and East Vanport (R. 71).

These releases do not demonstrate that the United States controlled the HAP operation. On the contrary, the releases, in every instance, are responsive to and consistent with the lessor-lessee arrangement. During the war FPHA, with scores of such leases throughout the country, naturally wished to standardize accounting, reports and procedures. This, and only this, the releases accomplished. They did not interfere with local management and they did not modify the basic lessor-lessee arrangement.* Moreover it is

*A number of the releases are in the record. Some of them (Exs. 65(m), 65(x)) are dated after May 30, 1948; others (Exs. 65(a), 65(e), 65(p), 65(q)) were rescinded or replaced prior to May 30; and others (Exs. 65(f), 65(g)) relate only to construction operations. One of the releases (Ex. 65(b)), has to do with the Hatch Act which by its terms applies to state employees working on projects financed in part by the United States. One (Ex. 65(c)) relates to in-grade promotion of FPHA employees and, as the numbering system indicates, has no applicability. One (Ex. 65(d)) relates to personnel policies but, as the exhibit itself makes clear, all the significant decisions, such as salary rates, vacation periods, etc., are left for local authority determination. One (Ex. 65(j)) relates to the lease requirement that the local authorities carry public liability insurance. One (Ex. 65(l)) relates to the prevailing wage requirements of the United States Housing Act of 1937. One (Ex. 65(n)) encourages local authorities to provide community services to their tenants without undertaking to specify what those services should be.

Since the United States had the ultimate financial risk with respect to the operation of the properties, a number of the releases have to do with financial matters: Accounting problems (Ex. 65(o)) uncollectible accounts (Ex. 65(v)), damage claims (Ex. 65(k)), budgets (Exs. 65(aa), 65(bb)) and rents (Exs. 65(ff), 65(gg)). The property at Vanport belonged to the United States and HAP as lessee was responsible for it. Accordingly, releases were issued having to do with inspection systems and fire hazard

Congress and not the author of an FPHA release who decides what is and what is not a federal agency. And Congress has made it plain that local housing authorities such as HAP are not part of the Federal Government.

In 1937 Congress declared its purpose with respect to low-rent housing to be "to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions * * * that are injurious to the health, safety, and morals of the citizens of the Nation." (42 U.S.C.A. 1401). To this end Congress provided for loans (42 U.S.C.A. 1409), annual contributions (42 U.S.C.A. 1410) and capital grants (42 U.S.C.A. 1411) "to public housing agencies", that is, to

"(11) The term 'public housing agency' means any State, county, municipality, or other governmental entity or public body (excluding the Administration), which is authorized to engage in the development or administration of low-rent housing or slum clearance. The Administration shall enter into contracts for

(Exs. 65(r), 65(s), 65(t) records and inventories (Exs. 65(ii), 65(mm), 65(m)), surveys in event of fire (Ex. 65(oo)), thefts and bonding of employees (Exs. 65(gg), 65(rr)), maintenance problems (Exs. 65(n), 65(ss), 65(tt)) and the disposition of surplus properties (Exs. 65(hh), 65(ii), 65(jj), 65(kk)).

Since it was agreed that during the war the tenants should be persons employed in war industries releases were issued relating to tenant eligibility (Exs. 65(y), 65(dd)). Of the remaining exhibits one (Ex. 65(w)) relates to moving expenses of tenants in projects on a terminated status, one (Ex. 65(z)) relates to projects other than war housing projects, one (Ex. 65(cc)) relates to the use of the premises for public health purposes and one (Ex. 65(pp)) is an index.

financial assistance with a State or State agency where such State or State agency makes application for such assistance for an eligible project which, under the applicable laws of the State, is to be developed and administered by such State or State agency." (42 U.S.C.A. Supp. 1402(11)).

This, obviously, is not a reference to an agency of the Federal Government. It is a reference to an independent organization with whom the United States is authorized to make all manner of contracts (42 U.S.C.A. 1409-15), to whom it may make loans (42 U.S.C.A. 1409) and arrange sales (42 U.S.C.A. 1412) and whose obligations (42 U.S.C.A. Supp. 1421(a)) are to be sharply distinguished from the obligations of the Government (42 U.S.C.A. 1420).

The war brought in its wake a host of housing problems. Congress provided for consultation by Federal representatives with "local public officials and local housing authorities" (42 U.S.C.A. 1545) on questions relating to war housing and authorized FPHA "to rent, lease, exchange, sell for cash or credit, and convey the whole or any part" of a war housing project (42 U.S.C.A. 1544) as it saw fit. Under the circumstances nothing was more natural than for FPHA to lease part of its war housing to local agencies such as HAP. This did not mean that the local authorities were *ipso facto* transformed into federal agencies.

Peace brought an end to the war aspect of the housing program but Congress recognized that in the hands of the

local authorities war housing might serve a useful post-war purpose. To this end Congress provided for a conveyance of the Government's interest in certain named war housing projects to "the following local public housing agencies." (42 U.S.C.A. Supp. 1586). In the list is Portland Project No. 35021, known as Dekum Court (Ex. 40), and the authorized conveyance is to "Housing Authority of Portland." (42 U.S.C.A. Supp. 1586). This is, of course, express recognition by Congress that HAP is a "local public housing agency" and not part of the Federal Government.

The legislative history of the Federal housing legislation is all to the same effect. In introducing Senate Bill 1685, which eventually became the Housing Act of 1937, Senator Wagner said (38 Cong. Rec. 1889):

"All the direction, planning and management in connection with publicly assisted housing projects are to be vested in local authorities, springing from the initiative of the people in the communities concerned. The Federal Government will merely extend its financial aid through the medium of these agencies."

The House Committee on Banking and Currency in its report on S. 1685 said (H. Rep. 1545, 75th Cong., 1st Sess.):

"General Statement

The bill provides assistance to the States and their political subdivisions in the remedying of unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families

whose income is so low that they cannot afford adequate privately owned dwellings. * * *

Decentralization

In contrast to present housing activities of the Federal Government, the bill contemplates a complete decentralization of the housing program, including the sale or leasing to public agencies of presently owned Federal housing projects. The bill does not authorize the direct Federal construction of any additional housing projects, but provides for a non-Federal program consisting of financial assistance to the states and their political subdivisions in the development and operation of local slum-clearance and low-rent housing projects."

In 1949 Congress carefully reviewed the housing program in connection with the Housing Act of that year. The Senate Committee on Banking and Currency again emphasized that local authorities such as HAP were strictly local organizations and said (S. Rep. 284, 81st Cong., 1st Sess.):

"The public-housing program is administered in the localities by local housing authorities which develop, own, and operate the low-rent projects. These local authorities were created pursuant to State law, and their members are usually appointed by the mayors of the respective localities. Although these local housing authorities have in almost every case enjoyed close and satisfactory relationships with the governing bodies of their localities, your committee has nonetheless believed it advisable to insert in the pending bill provi-

sions which will assure that the operations of the local authorities have the general approval and support of their respective local governments.

"The prime responsibility for the provision of low-rent housing is thus in the hands of the various localities. The role of the Federal Government is restricted to the provision of financial assistance to the local authorities, the furnishing of technical aid and advice, and assuring compliance with statutory requirements." (p. 16).

The House Committee on Banking and Currency expressed similar views. (See H.R. No. 590, 81st Cong., 1st Sess., p. 18).

This material, in the Government's judgment, leaves no room for argument. Congress has been very careful to make it clear that local agencies such as HAP must be recognized for what they are, that is, agencies of the several states and not agencies of the Federal Government. This is tantamount to saying that local housing authorities are not federal agencies within the meaning of the Tort Act. The Congressional determination on that point is clear and it is conclusive.

There is in fact no contrary suggestion in the books. Most of the states have housing laws roughly comparable to the Oregon legislation under which HAP was organized. In considering the constitutionality of such legislation careful attention has been given to the position and purpose of the local authorities. Nowhere has there been a suggestion

that the authorities are part of the Federal Government. See *The Housing Authority v. Dockweiler*, 94 P. 2d 794 (Cal. 1939); *New York City Housing Authority v. Muller*, 1 N.E. 2d 153, N.Y. 1936); *Opinion of the Justices*, 48 So. 2d 757 (Ala. 1950); *Nashville Housing Authority v. City of Nashville*, 237 S.W. 2d 946 (Tenn. 1951); *Opinion to the Governor*, 63 A. 2d 724 (R.I. 1949); *Dornan v. Philadelphia Housing Authority*, 200 A. 834 (Pa. 1938); *Belovsky v. Redevelopment Authority*, 54 A. 2d 277 (Pa. 1947); *Ryan v. Housing Authority of City of Newark*, 15 A. 2d 647 (N.J. 1940); *City of Phoenix v. Superior Court*, 175 P. 2d 811 (Ariz. 1946); 175 A.L.R. 1069. The courts have also been called upon to decide whether the local authorities are subject to suit. Again there has been no suggestion that they are federal agencies. See *Wickman v. Housing Authority of Portland*, 247 P. 2d 630 (Or. 1952); *Ryan v. Boston Housing Authority*, 77 N.E. 2d 399 (Mass. 1948); *Housing Authority of Birmingham District v. Morris*, 14 So. 2d 527 (Ala. 1943); *Muses v. Housing Authority*, 189 P. 2d 305 (Cal. App. 1948).

There is nothing in the record or in the precedents to support an argument that HAP is a federal agency. What single characteristic does it have in common with an ordinary federal agency? It was created not by Congress but by the mayor of Portland; it exists not because of a federal statute but because of an act of the Oregon legislature; it is operated not by officers of the United States appointed

by the President but by commissioners serving at the request of the Portland mayor; it borrows money from and enters into elaborate contracts with the United States, a procedure hardly sensible if HAP were part of the Federal Government. HAP is not a federal agency. The relation of HAP to the United States is strictly that of a lessee to its lessor, a contractual arrangement. The Tort Act provides expressly that "any contractor with the United States" is not to be considered a "federal agency". 28 U.S.C.A. 2671.

Just as HAP is demonstrably a local rather than a federal agency, so the employees of HAP are demonstrably employees of that organization alone and not employees of the United States. As of May 30, 1948, HAP had approximately 675 employees (R. 74) all reporting directly or indirectly to the executive director who, in turn, reports to the commissioners appointed by the Portland mayor (R. 73). Terms and conditions of employment for HAP personnel are fixed not by Congress but by HAP (R. 74). This includes salaries, vacation periods, working hours, rates of pay, etc. (R. 74). The application form provided to prospective HAP employees makes no mention of the United States (R. 74, Ex. 55). HAP employees receive their pay not from the Treasury but from funds obtained by HAP from rental payments (R. 74). This was the source of their pay in May, 1948 (R. 74). The HAP checks to its employees are not Treasury checks and they do not refer to the United States (R. 74; Ex. 56). HAP employees take no oath of loyalty

to the United States; they have no civil service status; they do not participate in the Federal Employees Retirement Plan; their rates of pay are not affected by general pay increases authorized by Congress for federal employees (R. 74). On the contrary they receive the benefits of the Oregon workmen's compensation scheme and approximately two-thirds of them, those engaged in maintenance work, are trade union members (R. 74-75). HAP under its union contracts obtains the help it requires by making demands upon the union (R. 75; Exs. 59-63), a method of employment hardly compatible with the civil service system. All employees of HAP receive their instructions from representatives of that organization and not from representatives of the United States (R. 72).

There is nothing here to support an argument that HAP employees are Government employees and the decisions in comparable situations are all to the contrary. In *Powell v. U. S. Cartridge Co.*, 339 U.S. 497, 507 (1950) munitions were made for the Government, under close Government supervision, from Government materials in a plant built and owned by the Government. The plant was operated by the Cartridge Co. on a cost-plus-a-fixed-fee basis with the result that the plant employees were paid with Government money. Nevertheless, the Court held that those employees were not federal employees:

"In these great projects built for and owned by the Government, it was almost inevitable that the new

equipment and materials would be supplied largely by the Government and that the products would be owned and used by the Government. It was essential that the Government supervise closely the expenditures made and the specifications and standards established by it. These incidents of the program did not, however, prevent the placing of managerial responsibility upon independent contractors.

"The relationship of employee and employer between the worker and the contractor appears not only in the express terminology that has been quoted. It appears in the substantial obligation of the respondent-contractors to train their working forces, make job assignments, fix salaries, meet payrolls, comply with state workmen's compensation laws and Social Security requirements and 'to do all things necessary or convenient in and about the operating and closing down of the Plant, * * *

* * * * *

"The petitioner-employees and the Government expressly disavow, in their briefs, any employment relationship between them. The managerial duties imposed upon the respondents were the duties of employers. That such duties be performed by private contractors was a vital part of the Government's general production policy. In the light of these considerations, we conclude that the respective respondents, in form and in substance, were the employers of these petitioners within the meaning of the Fair Labor Standards Act."

If employees in a Government plant, paid with Government funds and producing Government munitions under close

Government supervision are not United States employees, how can it be argued that the HAP employees working for an organization organized under state law, paid with private moneys, hired and fired by HAP officials, and subject to their daily activities to no Government supervision are federal employees?

Powell was a decision under the Fair Labor Standards Act. Comparable decisions have been reached under the Tort Act. In *Fries v. United States*, 170 F. 2d 726 (C.A. 6 1948) the United States Public Health Service provided funds and equipment to a county board of health to conduct, in cooperation with the Health Service, a venereal disease survey in an area where troops were quartered. The Government money was to be used, among other things, to hire chauffeurs, one of whom negligently injured the plaintiff. It was held that the United States was not responsible for the reason that the chauffeur was not a "federal employee". In *Lavitt v. United States*, 177 F. 2d 627, 629 (C.A. 2 1949) plaintiffs owned a warehouse and certain potatoes stored in it. They applied to the United States for a loan under the farm price support program. Under the statute local farmer committees selected inspectors to review loan applications. When plaintiffs' application was received, the local committee appointed inspectors who, in the course of their work, negligently set fire to the warehouse. It was held that the United States was not respon-

sible. The court ruled that the local committee was not a federal agency

"We think it clear that the Tolland County Agricultural Association is not a federal agency in any way resembling an executive department or independent establishment of the United States and it certainly is not a corporation. Its employees or officers were not and could not be selected by the United States or the Department of Agriculture, or discharged by either." (pp. 629-30)

and that the inspectors were not "persons acting on behalf of a Federal agency":

"The plaintiffs, however, assert liability on the ground that the inspectors were 'persons acting on behalf of a Federal agency in an official capacity,' and, therefore, governmental employees as defined in 28 U.S.C.A. § 941(b), above quoted. Perhaps they were to some extent acting on behalf of a federal agency as well as the borrowers, but to impose a liability based upon a putative agency over which the principal had no more control than in the present case would stretch governmental responsibility too far and might include all sorts of situations in which the United States required a conditional certification or approval before making a loan. It seems clear to us that the Government had no relation with inspectors chosen by the County Agricultural Association that would impose a liability to suit because of negligent acts on their part. A waiver of governmental immunity must be clear and in our opinion has not been shown in the present case." (p. 630)

There is nothing in the record before the Court, there is nothing in the books to support a conclusion that HAP is a federal agency or that its employees are federal employees.

Liability under the Tort Act depends upon the rule of *respondeat superior*. *United States v. Campbell*, 172 F. 2d 500, 503 (C.C.A. 5 1949); *United States v. Eleazer*, 177 F. 2d 914, 918 (C.C.A. 4 1949); *United States v. Sharpe*, 189 F. 2d 239 (C.C.A. 4 1951). Under that rule the principal is held responsible for the torts of a servant because he selects the servant and controls his activity. The United States did not select the employees of HAP and did not participate in any way in their day to day activities. Certainly the United States did not direct or control what the HAP employees did or did not do in connection with the flood fight. HAP is not a federal agency; its employees are not Government employees. This means that no claim can be presented against the United States on account of the alleged negligence of employees of the Housing Authority.

APPENDIX B

CONGRESS HAS PROVIDED THAT THE UNITED STATES SHALL NOT BE LIABLE FOR FLOOD DAMAGE.

Claims against the United States on account of flood damage are not novel. Floods are one of the most persistent of the nation's problems. The loss is frequently tremendous. The 1948 Columbia River flood caused damage estimated at one hundred million dollars. The property loss in the recent Kansas City flood was approximately two and one-half billion dollars. "The average annual losses from flood damage in the United States have been estimated from 100 to 500 million dollars * * *" (H. Rep. No. 1092, 82d Cong. 1st Sess., p. 6). Congress has always been unwilling to become responsible for flood damage. In response to a suggestion that the Government undertake an indemnity program for the victims of the Kansas City flood, the House Committee said:

"The budget request includes a proposal to indemnify flood victims for physical loss of or damage to tangible real or personal property up to 80 percent of the amount of such loss, provided that the amount to be paid any one person submitting such a claim does not exceed \$20,000. The Committee heard considerable testimony on this recommendation, and after careful deliberation has not approved it for several important reasons.

"Congress has never appropriated funds for indemnities such as have been proposed here in any

previous disaster of this kind, and no legislation has ever been enacted by Congress authorizing such appropriations. This would be a major departure from the present concept of Government and, therefore, must be given more extensive study than is now possible under emergency conditions that demand prompt action on the part of the Congress. The Committee believes that the approval of the proposed indemnification program would commit the Federal Government to a new concept of Federal responsibility which would result in an almost unlimited number of claims from victims of every 'Act of God' disaster throughout the country regardless of the type or size of the disaster. The financial implications inherent in such an action would be enormous." (H. Rep. No. 1092, 82d Cong. 1st Sess., p. 5.)

The courts have been as unwilling as Congress to "commit the Federal Government to a new concept of Federal responsibility which would result in an almost unlimited number of claims from victims of every 'Act of God' disaster." For many years and in a wide variety of circumstances, claims have been filed under the Fifth Amendment seeking compensation for damage caused by the Government's flood control operations. They have always been denied. *Bedford v. United States*, 192 U.S. 217, 224 (1904); *Jackson v. United States*, 230 U.S. 1, 23 (1913); *Cubbins v. Mississippi River Commission*, 241 U.S. 351 (1916); *Sanguinetti v. United States*, 264 U.S. 146 (1924); *United States v. Sponenbarger*, 308 U.S. 256 (1939); *Oklahoma v. Atkinson Co.*, 313 U.S. 508 (1941); *Gulf Refining Co. v.*

Mark C. Walker & Son Co., 124 F. 2d 420 (C.C.A. 6 1943); *United States v. West Virginia Power Co.*, 122 F. 2d 733 (C.C.A. 4 1941); *Goodman v. United States*, 113 F. 2d 914 (C.C.A. 8 1940); *Lynn v. United States*, 110 F. 2d 586 (C.C.A. 5 1940); *Franklin v. United States*, 101 F. 2d 459 (C.C.A. 6 1939). This is true even though the Federal officers, as an emergency measure, have dynamited levees, thereby inundating plaintiffs' property. *Hughes v. United States*, 230 U.S. 24 (1913); *Danforth v. United States*, 308 U.S. 271, 287 (1939).

This result does not depend upon doctrines of sovereign immunity or limitations in the Fifth Amendment. The Tennessee Valley Authority is subject to suit. Nevertheless, flood damage claims against it, even though asserted in terms of negligence or wrongful conduct, cannot be maintained. See *Grant v. T.V.A.*, 49 F. Supp. 564, 566 (1942). *Atchley v. T.V.A.*, 69 F. Supp. 952, 954 (1947). The decisive considerations are those of public policy. As Mr. Justice McKenna said in *Bedford v. United States*, 192 U.S. 217, 223 (1904):

"The consequences of the contention immediately challenge its soundness. What is its limit? * * * And if the government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. * * * Conceding the power of the government over navigable rivers, it would make that power impossible of exercise,

or would prevent its exercise by the dread of an immeasurable responsibility.”

To the extent that flood damage claims are founded upon the Fifth Amendment, they are, of course, beyond Congressional control. In the area, however, in which Congress is free to act, including the area of these cases, Congress has unequivocally forbidden recognition of such claims. 33 U.S.C.A. 702(c) provides:

“No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *”

In denying recognition to any claim against the United States on account of flood damage Congress was unequivocal and emphatic. And Congress meant exactly what it said.

Federal flood control legislation in this country goes back to 1851. In the general appropriation act for that year Congress provided \$50,000 “For the topographical and hydrographical survey of the Delta of the Mississippi * * *” (9 Stat. 523, 539). In 1879 the Mississippi River Commission was created and obligated to prepare for Congress “such plan or plans and estimates as will correct, permanently locate, and deepen the channel and protect the banks of the Mississippi River; improve and give safety and ease to the navigation thereof; prevent destructive floods; promote and facilitate commerce, trade, and the postal service; * * *” (21 Stat. 37, 38). In 1893 Congress created the California Debris Commission and instructed

it to look into problems of navigability and flood control on California rivers (27 Stat. 507). In 1917 by an Act "To provide for the control of the floods of the Mississippi River and of the Sacramento River, California," Congress appropriated forty-five million dollars to be expended for flood control purposes (at the rate of ten million dollars a year) under the direction of the Secretary of War and in accordance with plans of the Mississippi River Commission and the California Debris Commission (39 Stat. 948). And thus the matter stood until 1927.

In 1927 the Mississippi Valley was devastated by its flood of record. Congress immediately gave consideration to flood control measures, culminating in the Flood Control Act of 1928 (45 Stat. 534) entitled "An Act for the Control of floods on the Mississippi River and its tributaries, and for other purposes." Section 1 establishes a board of engineers to study Mississippi problems. Section 2 approves the principle of local contribution to the cost of flood control with specific exceptions. Section 3, paragraph one, obligates local interests to provide easements and rights of way and to assume responsibility for the maintenance and operation of the levee structures to be built under the Act. The second paragraph of Section 3 contains the language which now appears as Section 702c of Title 33. That paragraph reads as follows:

"No liability of any kind shall attach to or rest upon the United States for any damage from or by

floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.”

The statute goes on to provide for acquisition of flowage rights by the United States, for participation of various Government agencies in work to be done under the Act, for distribution of funds in connection with the Mississippi program, for further reports and studies and, finally, for a limitation on the contribution of the United States to flood control measures proposed by the California Debris Commission for California rivers.

The no-liability language of Section 3 came into the Act as a result of a conference between the House and Senate managers and without explanation (See H. Rep. No. 1505, 70th Cong., 1st Sess.). But it is not difficult to identify the source of this provision. President Coolidge in his 1927 State-of-the-Union message (Cong. Rec. Sen.,

Dec. 7, 1927, p. 106) reviewed the problems created by the 1927 flood, proposed additional flood control legislation, and added words of caution about the position of the Government. He said:

"It is necessary to look upon this emergency as a national disaster. It has been so treated from its inception. Our whole people have provided with great generosity for its relief. Most of the departments of the Federal Government have been engaged in the same effort. The governments of the afflicted areas, both State and municipal, can not be given too high praise for the courageous and helpful way in which they have come to the rescue of the people. If the sources directly chargeable can not meet the demand, the National Government should not fail to provide generous relief. This, however, does not mean restoration. The Government is not an insurer of its citizens against the hazard of the elements. We shall always have flood and drought, heat and cold, earthquake and wind, lightning and tidal wave, which are all too constant in their afflictions. The Government does not undertake to reimburse its citizens for loss and damage incurred under such circumstances. It is chargeable, however, with the rebuilding of public works and the humanitarian duty of relieving its citizens from distress."

This is clear enough: the Federal Government will extend its flood control program and provide relief where relief is needed; but it will not pay for flood damage. Section 3 was intended to put this point beyond argument. And it does so. There is no conflicting view.

United States
COURT OF APPEALS
for the Ninth Circuit

MEARL C. TILLMAN and EMILY P. TILLMAN,
husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

(AND RELATED CASES)

APPELLANTS' REPLY BRIEF

*On Appeal from the United States District Court for the
District of Oregon.*

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APPELLANTS' REPLY BRIEF

*On Appeal from the United States District Court for the
District of Oregon.*

STATEMENT

We are appalled at being met with so many mis-statements, contradictions and unfounded conclusions based on a Pre-trial Order that is not subject to dispute which we have met with during this proceeding. Now we are met in the opening statement of the Appellee's brief with the most glaring, most amazing and yet somewhat enlightning misstatement of all.

To properly understand this we should give the Court a little of the background. There are only two districts actually involved in this proceeding, Peninsula District No. 1 and Peninsula District No. 2. So many references are made to these two districts that both sides have fallen into the habit of referring to them as District No. 1 and District No. 2, without using the prefix "Peninsula". There is a third district, however, that has been mentioned incidentally which is known as Multnomah District No. 1. These three districts adjoin. Peninsula District No. 1 is on the west with Denver Avenue embankment as its eastern boundary. Peninsula District No. 2 is east of the Denver Avenue embankment with that embankment as its western boundary. Multnomah District No. 1 immediately joins Peninsula District No. 2 on the east, upstream, and has no connection with Peninsula District No. 1.

At the bottom of page 6 of the Appellee's statement of the case, counsel refer to the parenthetical statement made by Phillip Dater, the engineer at the time of the original organization of Peninsula District No. 2, to the effect that Denver Avenue embankment would have no water against it and, therefore, not act as a dike so long as there was no breaking of the fills or levees surrounding Peninsula District No. 1. This was a perfectly obvious statement which wouldn't require an engineer to see and has no bearing whatsoever on the case. Immediately following this at the top of page 7 counsel for Appellee make the following statement:

"On March, 1928, the supervisors of District No. 2 proposed and the Multnomah County Court ap-

proved an amendment to the plan of reclamation for the district (Exs. 72, 73, 74). The petition notes the elevation of the Denver Avenue fill at 33 feet m.s.l., *the elevation of the levees of District No. 1 at 32 feet*, calls attention to the fact that the levees of District No. 2 had been constructed only to 28 feet (Ex. 72, pp. 2-3) and proposes that these levees be raised to 33 feet (Ex. 72, p. 5). This work was apparently done as proposed (R. 18) and later, as has been noted, the levees were once more rebuilt by the Corps of Engineers (R. 19-22). Neither the district nor the Corps did any work on the Denver Avenue fill (R. 18-22)." (Emphasis ours)

This is a most glaring misstatement of the facts because it is a misstatement as to the wording of an instrument that was quoted verbatim in the pre-trial order. This appears in the printed record on page 26. The actual wording of this insofar as it is necessary to disclose the question is as follows:

"The Derby Street approach to the Interstate Bridge, by which Peninsula Drainage District Number Two is now bounded and enclosed on the west, was constructed by the County of Multnomah to an elevation of thirty-three feet at the crown. The dikes and levees constructed by and enclosing *Multnomah Drainage District Number One* of Multnomah County, Oregon, situated immediately to the east of Peninsula Drainage District Number Two, are all constructed to an elevation of thirty-two feet at the top. Your petitioners have been informed by the engineer for Peninsula Drainage District Number Two that the dikes and levees enclosing said Peninsula Drainage District Number Two should all be constructed to an elevation of thirty-three feet; * * * " (Emphasis ours)

This quotation is from the re-organization plan dated March, 1928, the entire petition being placed in the

file as Exhibit No. 72. Exhibit no. 73 referred to by Appellee was the order of the Probate Court dated May 19, 1928 confirming and approving the amended plan of re-organization. Exhibit No. 74 was the assessment of property in Drainage District No. 2 dated August 22, 1928 for the purpose of carrying out the plan. None of these exhibits are printed in the record but are in the file. There is no language in either of these exhibits contrary to the provision just above quoted.

Apparently the Appellee's counsel have concluded from this re-organization plan that it referred to Peninsula District No. 1 on the west instead of Multnomah District No. 1 on the east and that by this re-organization plan, Peninsula District No. 2 adopted the dikes surrounding Peninsula District No. 1 as its western protection and that by doing so, the Denver Avenue embankment, which divided the two districts, became merely a mound carrying a highway through the center which was actually one drainage district, and was not looked upon further as any protection against floods.

The Appellants, theory of this is that the fact that in this re-organization plan, Peninsula District No. 2 did not refer in any way whatsoever to Peninsula District No. 1 nor to any dikes surrounding it, shows conclusively that Peninsula District No. 2 had no confidence whatever in the dikes surrounding Peninsula District No. 1 and the railroad fills. The fact that this re-organization plan was followed immediately by the elimination of the joint pumping plant which had theretofore been operated by Peninsula District No. 1 and Peninsula District

No. 2, the culvert under the Denver Avenue embankment which was used for that joint pumping plant was immediately plugged and Peninsula District No. 2 put in its own pumping plant pumping the surplus water over its own dike into the Columbia slough, and the further fact that they assessed the landowner in Peninsula District No. 2 for the purpose of bringing its dikes up to the equivalent of the Denver Avenue embankment, confirms the Appellants' theory.

This statement on the part of the Appellee is amazing for the reason that the same theory and same statement was made by counsel for Appellees in their brief in the lower court. The Appellants in their reply brief called attention to this misstatement of the facts. Then realizing that this confusion was entirely possible because of the reference to District No. 1, the Appellants in their brief in referring to the same re-organization plan, on page 7, made this parenthetical statement

“Not to be confused with Peninsula Drainage District No. 1 to the west.”

Apparently we did not succeed in correcting the thinking of counsel for Appellee. It is inconceivable, and we do not believe that counsel for Appellee have made this misstatement of fact for the purpose of misleading the Court, but it does seem clear that they have succeeded in misleading themselves. This time we wish to call the Court's attention to this misstatement with sufficient certainty that this Court cannot be confused by this contention on the part of the Appellee and this misstatement of fact.

In the opening paragraph above we remarked that this statement was somewhat enlightening. It is somewhat enlightening for the reason that it would appear that the lower court was actually misled, the same as counsel for Appellee. If the Appellee's brief is read and the opinion of the Court below is read, with the assumption that both the Court and counsel for Appellee succeeded in misleading themselves by this misconception of the fact, then many of the statements made by the Court below as well as the statements and contentions of the counsel for Appellee become more understandable. The Appellee in its brief repeats and repeats this misstatement and refers to it in advancing their theories until it seems to the Appellants that their entire theory of the case and entire defense is based upon this misstatement and this misconception of the facts.

There are other discolored statements of fact in the Appellee's statement which for the most part seem to be a repeat of the statements set forth in the findings of fact. Since these have been answered rather fully in Appellants' brief we feel it is unnecessary to call further attention to them at this time.

The actual situation which we believe is revealed from the entire evidence in this case is that the Kaiser Company simply rode rough shod over everybody. They acquired a mile square of land in Peninsula Drainage District No. 1 which was swampland and had not been developed, lying behind railroad fills of uncertain quality over which the Peninsula District No. 1 had no control. There was no showing that there was any engineer's

report obtained as to the safety of building the housing project in that area. Then they started cutting an underpass through Denver Avenue ten days before a permit was obtained subjecting the people and the property which had been highly developed in Peninsula District No. 2 to the hazard of the uncertain railroad fills to the west of Peninsula Drainage District No. 1. They made no showing that other access and exit roads could not be developed without destroying this embankment which was obviously used for the protection of District No. 2. They had constructive notice by the recording of the deeds that the landowners in District No. 2 had an easement on the Denver Avenue embankment and the title to the property was taken by the United States subject to this easement. They gave no notice to anyone nor opportunity to object or take any action to prevent the construction of this underpass. They built the ring levee for their own protection only and obtained no engineer's report or advice as to the construction thereof. The entire project was developed by Mr. Kaiser and he carried on without regard to the safety of the people, or their properties, or the safety of children gathered in the grade school, or the consequences of the hazards which were being developed. The Appellee followed his lead, permitted the destruction of private property rights and paid the bill for doing so. The Kaiser Company was clearly the agent of the United States.

ARGUMENT

No. 1. Reply to Appellee's argument Item No. 1 to the effect that Denver Avenue was always a highway and not a levee.

In the argument on this point Appellee again, on page 22, refers to the reorganization and reiterates the same misstatement as is pointed out in our statement. Here Appellee quotes two sentences from this short paragraph in this reorganization plan but fails to quote the sentence that refers to Multnomah District No. 1. They seem content with their own statement as to that, in the following words:

“and the construction of the levees in District No. 1 to an elevation of 32 feet.”

If it were not so inconceivable, one might readily conclude that by quoting sentences from this short paragraph in this reorganization plan without quoting the material one showing the reference was to Multnomah District No. 1 and not to Peninsula District No. 1 was a deliberate attempt to confuse the Court. If that was done it would explode the Appellee's entire argument.

In this section of Appellee's brief, Appellee refers to the provisions in the deed to Multnomah County whereby the grantor, Peninsula Industrial Company, reserved unto itself the right to construct crossings over, under and across this right of way and to do other things which they interpret as showing that it was never intended to use this embankment as a dike. The Court will recognize that this deed was excellently drawn. The circumstances

at the time was that Peninsula Industrial Company, an industrial company, owned this body of land making up Peninsula Districts Nos. 1 and 2, covering a considerable acreage, in close proximity to Portland. At that stage of undevelopment this Company was undoubtedly uncertain as to what form of future development this property would take. They might desire to put in crossings, either railway or water crossings, might desire to develop part of it as industrial, thereby requiring crossings, or they might desire to develop it as suburban property for industrial and home purposes in which event dikes would be required, and this was the manner in which it was ultimately developed. The Court will recognize that these were rights that were reserved to the grantor only and not to the grantee. They could exercise these rights or not as they might desire in the future. The record shows that they did not desire to use any of these rights but instead organized drainage districts on either side of Denver Avenue, which required maintenance of this embankment. If they had desired to make it into one district and not to consider Denver Avenue embankment, they would have organized it as one district. They would not have organized it as two districts. They would not have organized District No. 1 adopting this embankment as its eastern boundary and District No. 2 adopting Denver Avenue as its western boundary. They could just as well have organized the entire thing into one District and disregarded Denver Avenue Embankment if that was their intention. Our position is, and we do not believe authorities are necessary to be cited, that when they join with other property owners who had become

owners of part of the land at the time of the organization of the Districts, they could not after that exercise any of these rights to cut waterways or crossings through this embankment which they adopted as their western protection. Neither could any other successor in interest exercise any such rights unless perhaps they owned the entire District.

Counsel further argues that the County did not construct this embankment as a levee nor agree to maintain it as a levee for flood protection. There is no contention on the part of the Appellant that there was any agreement on the part of the County or the State Highway Commission to construct this as a levee or to maintain it as a levee or to guarantee the District against floods. The contention of the Appellants, and it is so clear in the deeds, that what the County agreed to do, and the State Highway Commission agreed to do when they took this highway over, was to maintain an embankment across this property that was equal to the bridge approach. The grantor and its successors in interest had the right to hook on to this embankment and use it for any purpose they saw fit so long as it did not interfere with the highway over the top. If this embankment had washed out after they carried out their agreement to so construct it, it is not contended that the landowners of District No. 2 would have any right of action against the County or Highway Commission for failure to protect them against floods. They were only required to maintain an embankment equal to the bridge approach. The facts show that they agreed to maintain such an embankment. By referring to Item No. 4 of the Appellants' brief, it will be

readily seen how well they did comply with this agreement. The embankment was built in the identical manner and with identical material as used in the construction of the outside dikes and it was built to a size of more than three times the size and strength of the strongest of the outside dikes. In other words it was a monster compared to the outside dikes. The residents and landowners in District No. 2 were perfectly safe in relying upon this embankment which they had the right to use as flood protection. This embankment did withstand the flood and no water would have entered into District No. 2 except for the underpass which was built through it in violation of the easement which the Government recognized when they procured the title by condemnation proceedings to the land immediately adjoining the underpass on the east. The provision in the deed that the County would maintain a public highway over this embankment did of itself guarantee that the embankment would always be maintained equivalent to the bridge approach and would be the best possible dike protection that the owners of land in District No. 2 could possibly provide. We fail to see where the Appellee can get any comfort out of the provisions of this deed. In our humble opinion it was a most excellently drawn instrument and fully provided for the use of the embankment by the grantors and their successors in interest in any manner in which they desired to develop their property.

Neither can we see how they can get any comfort in the proposition that the State Highway Department did not agree to protect this embankment as a levee or

guarantee District No. 2 against floods. The Appellants would have been perfectly satisfied had they maintained the embankment equal to the bridge approach and equal to the strength to which it was built. There is no suggestion in any of the proceedings, in the deed or otherwise that would authorize or justify the destruction of this embankment by the construction of an underpass by the Highway Commission, or by anyone else except by the original grantor prior to the organization of Peninsula District No. 2.

No. 2. Appellants' reply to Item No. 2 of Appellee's brief contending that the construction of the underpass was lawful and proper.

Here again counsel for Appellee seem to be laboring under the idea developed from their mental confusion that Denver Avenue embankment was abandoned by Peninsula Districts No. 1 and No. 2 by the reorganization of Peninsula District No. 2, leaving the embankment as merely an embankment carrying a highway through the center of one District.

Appellee maintains that this was for public highway purposes and cite the statutes of the State of Oregon and many authorities holding that the Highway Commission has control over its highways. They seem to maintain that since the Highway Commission had this control over the highway it had the right to authorize the construction of this underpass. We find no dispute to make with the statutes nor with any of the authorities cited by Appellee except that none of them apply to

the situation in this case. No authority is cited and of course none could be found to the effect that because there is a highway under the control of the Commission that they can appropriate and destroy the rights of individuals without either buying or condemning those rights.

In this case over two-thirds of this highway fill belonged to individual ownership. The Highway Commission had only an easement to maintain a fill for the purpose of supporting its highway over the top of the fill. The Highway Commission and the County of Multnomah recognized the easement of the landowners in accepting the deed from the Peninsula Industrial Company. The United States Government recognized the easement in condemning the property on the east side of the fill by condemning it subject to the District's easement. This is as much a property right as if they owned the entire fee and the County and the State had no rights over it whatsoever. No authorities would seem to be necessary to the effect that this easement could not be appropriated by the Highway Commission or anyone else except by either buying or condemning that easement.

The Highway Department maintains another highway known as Marine Drive running over the outside dike along the Columbia River. If Appellee's contentions are sound, that because they own the highway they can do anything with the fill they desire, then, without any action whatsoever, without consent from the District or any landowners, the Highway Depart-

ment could cut underpasses or destroy the outside dike protecting Peninsula District No. 2 along the Columbia River.

One of the other contentions is that this underpass was for public safety and was constructed for proper highway purposes. No one can read the permit which was issued by the State Highway Commission without being sure that this was nothing but a private way for ingress and egress to and from the government's housing project for temporary purposes only. They contend that it was to be maintained by the Highway Commission but the permit shows that it was maintained by them during the period of war only and then at the expense of the government. This does not place it as a public highway. Under this permit the maintenance of this underpass after the war seems to be nobody's business. It is certainly not a public highway.

No. 3. Appellants' reply to Item 3 of Appellee's brief contending that even though the underpass had been unlawful, no rights of Appellants would have been violated.

To begin with, let us point out again that on page 34 the Appellee refers to the reorganization plan and recites that the proceedings carefully distinguish between Denver Avenue and the District levees. They seem to still be laboring under their mental confusion that the reorganization plan had something to do with the levees in Peninsula District No. 1. This mental confusion seems to underlie every argument presented by the Ap-

pellee. In this argument they repeat also another contention that has continuously been made, time and time again by the Appellee, that the Appellants in this case, none of them, ever owned any part of the right of way. That is any part of the fee title to the embankment by which the highway was supported, and therefore never had any rights in it. We have never been able to understand quite Appellee's continuous contentions to this effect. The fee simple to all but the center 80 feet of the Denver Avenue embankment belonged to the adjoining owners in the beginning and always since. Apparently the Appellee takes the position that since the government condemned the property immediately adjoining the embankment where the underpass was constructed, no one of the Appellants had any interest therein. We have pointed out and it seems perfectly obvious to counsel for Appellants that when this property in Peninsula District No. 2 was put into a drainage district, every property owner in that District has the right to have this embankment maintained. It was their western border, it was their western protection, has always been referred to as such, and it has always been so used and it is perfectly obvious to anyone on the ground.

As was said in the case of *U. S. vs. Florea*, 68 Fed. Sup. 367, at page 374, "neither private individuals nor government agents could escape notice of the fact that these lands would be of no value without diking protection."

Following this the Appellee makes the contention that the Appellants are not shown to be successors in

interest to the Peninsula Industrial Company and cite the fact that some 46 individuals joined in the organization of Peninsula District No. 2. It is true that there were 46 different individuals and corporations joining in this original organization which makes it all the more obvious that Peninsula Industrial Company itself could not after that date destroy the Denver Avenue embankment since that embankment was adopted as the western border and protection for the drainage district. After that the Peninsula Industrial Company would have no more authority to cut this embankment than any other owner in the District. This would apply to the United States Government the same as any other owner of property within the borders of District No. 2. The mere fact that the government obtained the title to the ground immediately adjoining the underpass gave it no more rights than any other individual landowner in the District.

Appellee contends that since there was forty-six different owners of land in the District when it was organized that they cannot be successors to Peninsula Industrial Company. This can hardly be contended seriously because the original deed was given in 1915 and District No. 2 was organized approximately $2\frac{1}{2}$ years later in 1917. There were $2\frac{1}{2}$ years during which these forty-six owners could and probably did obtain titles to this land from Peninsula Industrial Company. In any event whether or not they acquired their title directly from Peninsula Industrial Company they joined in the organization of the District which gave the entire District all the rights in the Denver Avenue embankment

that was owned and controlled by Peninsula Industrial Company.

Appellee also contends that there is no showing of land ownership or the succession from Peninsula Industrial Company. It will be remembered, however, that it is stipulated in the Pre-trial Order that these Appellants were all owners of land within the District. Neither the titles, therefore, nor the damages to their lands were necessary elements in this proceeding wherein we are trying only the question as to whether the United States Government was liable for the damages resulting from flood. If the decision of this Court were to be, (which we do not believe can happen) that the Appellants must be successors in interest to Peninsula Industrial Company, then that will be a question to be determined upon a hearing as to the damages in the event the lower court is reversed as to its ruling on the liability of the United States Government. If we were suing the County and Highway Commission for breach of contract this question might become pertinent but not in this case.

Appellee next in this same item in its argument goes into the question of whether this provision in the agreement was a covenant or a condition subsequent. This same question was raised by counsel for Appellee in the lower court but since the Court did not find in their favor and no cross-appeal was taken, it would seem that the question should be settled. However, let us briefly go into the subject. There is no rule laid down by the Oregon Supreme Court better known nor more universally followed nor more frequently cited than the

rule laid down by Justice Wolverton in the case of *Arment v. Yamhill County*, 43 Pac. 653, 28 Or. 474, in which the Court said:

“But like all other contracts in writing, this must be construed by taking it at the four corners and looking through the whole instrument from the identical standpoint of the contracting parties when it was entered into, and that construction must be given it, if possible, which will give effect to all its parts and carry out the obvious intention of the parties, and which will make the contract legal, rather than one that will render it void. *Hildebrand v. Bloodsworth*, 12 Or. 80, 6 Pac. 233; 2 Pars. Cont. 500, 505.”

Now taking this deed and applying this rule of interpretation, there can be no possible construction given to it than that it constituted a contract between the county and its successors and Peninsula Industrial Company and its successors whereby the County agreed for itself and its successors to construct within three years an embankment equal to the bridge approach and thereafter maintain it. This contract cannot be avoided regardless of any other wording in it to hold this agreement void. Counsel cite a good many cases in the construction of conditions subsequent and contend that since the obligation of the grantee under the deed is stated as a condition subsequent and not as a covenant the only remedy is the right of re-entry. Then they quote from 26 C.J.S. 473 to the effect that if the language imparts a condition merely and there are no words imparting an agreement, it is not enforceable as a covenant.

Taking this authority they have cited, we find the following statements under subdivision E, Sec. 141, page 472:

“As shown in Covenants § 1 b, whether a particular provision is a condition or covenant depends on the intention of the parties. The question is a matter of construction. Covenants and conditions may be created by the same words, but forfeitures are not favored. Courts are therefore more favorably inclined to holding that the language used constitutes a covenant rather than a condition which will forfeit the grant. This rule is especially applicable where the words used are in the form of a covenant pure and simple, and there are no words of proviso, or condition, or provision for reentry in the deed.”

We could quote the entire article cited by Appellee but we fail to see where the Appellee could get any comfort out of any of the statements therein contained. There can be no question but what this must be construed as a covenant that must be performed by the county and its successor, the Highway Commission.

The other authorities cited by the Appellee on this question would only have an academic value, if any, as none of them apply to the facts in the case. The only way the Appellee attempts to avoid the legal results of what took place is by attempting to avoid the facts as set out in the Pre-trial Order and not subject to dispute. On page 33 of this item in the Appellee's brief, they set out Statute 123 OCLA 216 (4 ORS 551.140) which refers to the Realignment of Dikes which the Appellants rely upon and which provides that where any owner of any portion of the diking district has a dike running over its land and it desires to realign the dikes, it must

substitute equal protection therefor. Appellee contends that this only applies where the diking district owns the land. Therefore, it couldn't apply. This section, however, does not so provide. It provides:

"The applicant shall construct the new dike at his own expense, and up to the standard of the original, of which fact the superintendent shall be the judge. The dike thus constructed shall become the property of the district in the same manner as the original, and subject to the same regulation, and the right of way of the original dike thereon becomes vacated."

As we read this section, it provides that a new dike should have been substituted and the district given an easement to the same extent as it had on the Denver Avenue embankment. The Appellee denies that there is such an easement but it seems to us that it is undisputable, it is set out in no uncertain terms in the deed of conveyance and is not subject to any other interpretation. The Appellee answers the question why the Court below did not refer to this statute in the following language:

"As Appellants point out, the court below did not comment on this statute—for the very good reason, no doubt, that it seems self-evident the statute has nothing to do with this case."

This is a novel argument indeed. It is only understandable by remembering that counsel for Appellee had a mental confusion as already pointed out to the effect that the re-organization plan of Peninsula District No. 2 adopted the levees of Peninsula District No. 1 and abandoned the rights and claims in Denver Avenue em-

bankment so it would be left merely as a mound with a roadway thereover running through the two districts, Peninsula Drainage District Nos. 1 and 2, through the center thereof. This statement on the part of the Appellee to the effect that this statute was not mentioned because it had nothing to do with this case is immediately followed and apparently based upon their oft-repeated contention that when District No. 2 was re-organized it adopted the dikes of Peninsula District No. 1 as its western protection which imaginary fact exists only in the mentally confused idea of counsel for Appellee.

No. 4. Appellants' reply to Item No. 4 in Appellee's argument to the effect that Denver Avenue was not constructed or maintained by the United States or its employees.

If we understand the Appellee's argument in this section of their brief, it is to the effect that the only one that caused any damage was the one who manipulated the spade in taking out the fill and whoever he was he was not an employee of the United States. As we get their theory it is that the United States would not be liable because it did not manipulate the spade. For this you must look to the contractor. The contractor would not be liable because he was only carrying out his contract in fulfilling the obligations imposed upon him by the Government's contract and likewise he did not handle the spade. The superintendent and foreman in turn would not be liable because likewise they

were only carrying out their duties and were not permitted by the unions to handle tools. So the only one under this theory as we can determine would be the lowly workman who actually handled the spade. No negligence could be attached to him because he was merely carrying out his duties and you couldn't say that there was a negligent act. The act was a wrongful one in the first instance when the Government undertook to build an underpass. The Kaiser Company, Inc., representing the United States, executed the contract with the Tower Sales & Erecting Company to build this underpass for the United States (Exhibit No. 8, R. 259).

The District Court disposed of this argument on the part of the Government in no uncertain terms and no cross-appeal has been taken from that decision. We call the Court's attention to the District Court's opinion on page 135 of the record wherein the Court said:

"But, it is said, the Court is bound by its previous decisions, the principles of which fix liability here on the United States. It is true that it has been held here that an employee of the Portland Housing Authority can by wrongful act or omission bind the government in damages. Also, where the government acts in creating a situation on land under its control which would be held negligent under the laws of the particular state if done by a private corporation, the government can be held liable under the statute. Furthermore, the particular agent who performed the act or was guilty of the omission need not be pointed out and proved by name. Where such an act or omission is proved, responsibility cannot be escaped simply because there was a choice of means exercised by some government officer or agent. * * * "

Also we call the Court's attention to the note number 17 beginning at the bottom of page 135 of the record which reads as follows:

"This implication seems to arise from the language of the Court in the case of *Dalehite vs. United States*, 346 U. S. 15, 44-45, where it is said: 'It is to be invoked only on a "negligent or wrongful act or omission" of an employee. * * * But the statute requires a negligent act.' These two sentences are diametrically inconsistent. For the purpose of clarity, it is noted that, in the instant case, this Court, in finding no liability here does not rely upon the fact that the individual agents of the government are not named or designated. The statute says, 'The United States shall be liable, respecting tort claims, in the same manner and to the same extent as a private individual under like circumstances.' If, under the law of the state, a private individual could be held for release of waters over the land of another, the United States can be also. Inaccurately labeling the state doctrine as one invoking 'liability without fault' by arbitrary fiat determines there can be no fault except negligence. Here this Court only holds that a private person would not be liable under the exact circumstances."

No. 5. Appellants' reply to Item 5 of Appellee's brief to the effect that there was no negligence or wrongful conduct in connection with the construction and maintenace of ring levee.

A reading of this section of the Appellee's brief indicates very clearly that counsel are basing it upon their confused idea that when Peninsula District No. 2 filed its re-organization plan it referred to and adopted the dikes of Peninsula District No. 1 and thereafter the

Denver Avenue embankment was abandoned and became nothing but a mound running through the center of one levee district. We have already pointed out the fallacies of this presumption.

Its counsel argue that the failure of the railway fill was unforeseeable (which is not the fact). Then they argue that in the absence of any reason to anticipate the failure of the railway fill due care and good engineering practice did not require the construction of the ring levee or any secondary levee at the site of the underpass. They argue that the ring levee was only constructed to guard against overtopping of the District No. 2 levees to the east and no protection was required from the west (This statement is likewise fallacious as it has been shown that the Denver Avenue embankment had been lowered at one point to the same height as the dikes surrounding District No. 2).

From these facts they argue that there was no reason for building a ring levy to protect the underpass. Now if their assumption of the facts were not so fallacious there might be some excuse for them not building any ring dike at all at the site of the underpass as in such event Denver Avenue embankment had no part in the situation. As we have tried so strenuously to point out, however, ever since this case started, the Denver Avenue embankment was adopted as the western border of Peninsula District No. 2. It was a primary dike and the only dike that Peninsula District No. 2 had or relied upon. It was not a secondary dike. It may be referred to as a secondary protection as to that section that lies

between the north and south dikes of Peninsula District No. 1 for the reason that as quoted in the pre-trial order, there would be no water against that portion of the embankment so long as there was no failure of the dikes or fills surrounding Peninsula District No. 1. Nevertheless, it was Peninsula No. 2's primary dike and that dike was wrongfully destroyed by the Appellee. This required, under the statutes of the State of Oregon and under the laws of the State of Oregon, as has been pointed out in the Appellants' brief, that the one so destroying it had the duty to protect it with an embankment equal in strength to the one removed. It will be noticed that if the Appellee had proceeded in the way provided by the statute and procured a court order permitting the removal of this embankment and had substituted protection equal in strength to the satisfaction of the superintendent of the district, then there would be no further obligation on the part of the Appellee, whether or not it be washed out by flood. Since, however, they did not procure this order and permission to remove this dike but removed it upon their own account, without any authority, then it seems to the Appellants that it becomes an absolute duty upon the Appellee to protect Peninsula District No. 2 against flood waters flowing through the underpass. In other words, they become practically guarantors that the ring levee be sufficient to protect Peninsula District No. 2. The same theory applies to the County and the Highway Commission. So long as they maintained the Denver Avenue embankment equivalent to the bridge approach under the very clear terms of their contract, they did

not guarantee that it was sufficient to withstand flood waters nor would they be liable should it fail to hold. When, however, they remove that embankment, without authority, then they too become guarantors of the efficacy of the ring levee.

Now applying these facts, which are undisputable, then the arguments set forth in this Item 5 of their brief become meaningless.

There is one more contention on the part of the Appellee in this section to which we wish to call the Court's attention. They refer here, as they have frequently, to their testimony to the effect that the Corps of Engineers of the United States does not build secondary levees. The argument seems to be that Denver Avenue embankment was a secondary levee and, therefore, should have no money spent on it. In answer to this we wish to call the Court's attention to the fact that Peninsula District No. 2 provided for this Denver Avenue embankment for its western and primary dike whether or not it be considered as secondary protection for a certain section of it. The Government's own expert witness, Mr. Turnbull, after much hedging, testified (R. 243-244) that they should not take out a secondary dike which was already there. It follows from this that even if this section of Denver Avenue embankment be considered a secondary protection it was unsound and negligent to take it out. This is particularly true in this case when the history of the Columbia River is read with its annual floods and the completion or flood report of Government engineer Doble is read in which he recommends many

things to protect all dikes, primary and secondary, to protect against these expectant floods, and particularly recommends that the Denver Avenue underpass be eliminated.

As to there being no wrongful or negligent conduct on the part of the Appellee, we believe the facts so thoroughly establish that fact that little additional argument is required. We do, however, wish to call the Court's attention to the case of *House v. Los Angeles Flood Control District*, 25 Cal. 384, 153 Pac. (2d) 950. This case is peculiarly identical with the instant case. In that case the Court at page 950 of the Pacific Reporter says:

"In the present case the defendant district may not escape liability on any theory of exercising a riparian right, for the plaintiff does not correlate her damage claim with any such principle. Rather she makes the direct charge that the defendant district removed a safe and secure protection to her land immediately adjacent thereto and substituted therefor an unsafe, careless and negligently planned bank or wall, resulting in the overflow, inundating and washing away of her property, which had theretofore never been visited by the river waters. It is a principle of universal law that wherever the right to own property is recognized in a free government, practically all other rights become worthless if the government possesses an uncontrollable power over the property of the citizen. Upon this premise the plaintiff relies on the *unnecessary* damage to her property as the result of the defendant district's negligence in the planning, construction and maintenance of the flood channel work to sustain the constitutional basis of her claim. In other words, it is her position that damage suffered by a property owner as the result of a public improvement undertaken in the exercise of the police power must have

some reasonable relation to the purpose to be accomplished under the prevailing circumstances, and that the governmental agency proceeding with such work may not needlessly inflict injury upon private property without being liable to make compensation therefor. This accords with the general object of the constitutional guaranties in protection of property rights and but places upon a reciprocal basis the individual's damage in relation to the public benefit. *Unnecessary* damage to his property is of no benefit to the public; rather it only entails unwarranted sacrifice and loss on the individual's part, which should be compensable damage." (Emphasis ours)

Counsel for Appellee do not seem to recognize that acts of omission are negligent the same as acts of commission. Where there is a duty on the part of a defendant the failure to perform that duty constitutes negligence the same as a faulty compliance with such duty. This rule is recognized in the State of Oregon in the case of *Rice v. City of Portland*, 7 Pac. (2d) 989, as well as many other cases, and is recognized by all of the authorities. We do not believe it necessary to cite numerous cases on principles so well established.

Still one more item referred to in this section of the Appellee's brief we feel should be again called to the attention of the Court. On page 45 they make the statement that from the point of view of structural stability of the ring levee the Government experts testified it was in every way comparable in strength to the Denver Avenue fill. The Government's expert witness, Mr. Turnbull, revealed in his testimony (R. 242) that he was basing this comparison of the ring levee with the point

in Denver Avenue where the old five foot culvert had been constructed which had started to wash on the apparent presumption that if nothing was done with this five foot culvert the highway embankment would have been washed out at that point. Otherwise these expert witnesses' testimony were meaningless. It has been shown in the pre-trial order and pointed out in Appellants' brief, that the Denver Avenue embankment was over three times the size of the ring levee and that it was built in the identical manner as the outside dikes. Whereas the ring levee was built entirely differently and was built as a one-way dike, that is it was built to protect against water coming from the east only with no intention to protect against water from the west and it had no value for such protection. We have also pointed out in our brief and it is shown in the pre-trial order that this little five foot culvert, originally used for a joint pumping plant, was only five feet in width whereas the ring levy was 800 feet. Also the culvert was plugged under the supervision of government engineers. All experts testified that that could be done. No doubt Peninsula District No. 2 anticipated that if any emergency arose this little five foot culvert could be plugged at any time to stop any flood. That their anticipation was correct is shown very clearly by the flood or completion report filed by Government engineer Diblee. His report was that while this culvert did start to break it was stopped in a very few hours at a time when the flood waters were lapping at the top of the Denver Avenue embankment. It is a matter of common knowledge that during any flood it is always anticipated that

there may be weak spots develop in the best of the dikes. For this reason every available man is called out during the flood fight and these small weak spots are controlled. In this case there was no such possibility with the 800 foot ring levee built for one way protection only.

We also wish to call the Court's attention to the fact that Section 1346 (2b) of Title 28, U.S.C.A. provides that the District Court shall have jurisdiction of claims for damages against the United States "caused by the negligent or wrongful act or *omission* of any employee of the Government. * * *" In this case we have not only the wrongful act in the first instance of the destruction of Denver Avenue embankment, but we have the "omission" from the fact that the Government failed to substitute equal protection thereafter and this failure was continuous from the time of the original destruction of the embankment to the date of the flood.

**No. 6. Appellants' reply to Appellee's argument
No. 6 to the effect that the levee was not built
or maintained by the United States or its em-
ployees.**

In this argument the Appellee maintains again that since the United States didn't remove the dirt, didn't manipulate the spade in removing the dirt by its own hands they were not responsible and that the employees of the Portland Housing Authority were not employees of the United States Government. There might be some force to this argument if this was a case where some employee of the Portland Housing Authority was in an

automobile accident and negligently caused damage to a third party, but we cannot see how it can have any bearing upon this case. In this section of the argument they refer to Appendix A of their brief wherein they have set out some sixteen pages of citations, decisions and statutes, Congressional proceedings, Senatorial speeches and what not to prove that employees of PHA were not employees of the United States.

In this case as we see it, it would make no difference whether FPHA leased this housing project to PHA or to anyone else. The evidence clearly shows that FPHA retained complete control and while the employees were paid from collections by PHA it was paid by monies belonging to FPHA. If there was any money left it went to FPHA.

It is particularly shown in this case that FPHA retained complete control of the project and particularly of the ring levee. Mr. Donovan C. Byers, the engineer for PHA, in his deposition (R. 359-364) and Mr. Clinton S. McGill (R. 192-193), the maintenance engineer for PHA, both testified to the effect that the ring dike was not a proper protection and that they procured the advice of government engineers, prepared plans for bringing the ring dike up to standard and submitted the plans to FPHA in Seattle, the cost thereof to be \$8,000.00 or \$9,000.00. They both testified that Mr. A. A. Pearson, the regional engineer of FPHA, visited Portland thereafter and they were told that they had exceeded their authority and their plans were rejected. They were instructed to prepare plans for filling the cracks and making some

repairs and according to Mr. McGill's testimony (R. 102), the only repairs made were that these cracks were dumped full of dirt and raked over so they wouldn't constitute a hazard to anybody that walked around the top of the dike. This shows, we contend, that no matter what the purpose of FPHA and even if it had been let out under the same circumstances to any third party, FPHA still would control. And the negligence in maintaining the ring dike that was not sufficient to fulfill the duty owed to District No. 2 was the negligence of FPHA.

At any rate, the District Court settled this very effectively in *Clark v. United States*, 109 Fed. Supp. 213, wherein the Court said at page 223:

"However, there is no doubt that Federal Public Housing Administration had complete control of the Vanport operation and had authoritarian domination over the acts and conduct of all employees on that government owned housing establishment from Project Manager to janitor. A series of the now familiar executive directives controlled in the most meticulous manner the minute detail of financial ownership, operative and managerial functions. Furthermore, by a series of paternalistic pronouncements, the lives, recreation, health and public relations of the tenants were controlled from the central agency in Washington.

"The fact that the Authority was a federal agency is demonstrated by recent decisions. With reference to the management of Vanport, there is little question that the entity was acting as an agency of the United States, as the Oregon statute empowered it to do. * * * "

We respectfully submit that the reasons for making FPHA chargeable for the neglect of duty in this case is

a great deal stronger by reason of the circumstances set forth than was true in the Vanport cases above quoted from.

No. 7. Appellants' reply to Item No. 7 of Appellee's brief to the effect that the United States was not obligated to provide flood protection to Appellants.

In this section of the Appellee's brief they obviously are still going on the fallacious theory that Peninsula District No. 2 in its re-organization adopted the levees and dikes and fills of Peninsula No. 1 and thereafter relied on them completely, and Denver Avenue embankment became merely a mound with a highway running over it. It could only be on such a theory that the Appellee could contend that the United States had no obligation to provide protection against the underpass.

In this section of their brief they take the position that the Government was one of many owners of parcels of land within Peninsula District No. 2. That it had the right to do anything they liked for their own protection and had no obligation whatsoever to any other landowner in the district. Their theory seems to be that any one landowner can cut the dikes subjecting the entire district to floods and it is up to each individual owner of property to protect himself against their wrongful act.

We wish to call the Court's attention to the very well considered case of *United States v. Florea*, 68 Fed. Supp. 367. At page 371, beginning in the middle of paragraph number 2, the Court said:

“ * * * But it will be clear that the levying of of assessments in a Drainage District, particularly one which has erected dikes for flood protection, is a property right which belongs to the aggregate of the owners within the boundaries and is simply entrusted to the District in order to permit collections and payments to be made under authority of the state. The public interest in reclamation and protection against flooding of agricultural land dictates this solution.”

Again, beginning at the bottom of page 376 the Court says:

“The situation of the Drainage District may be conceived of as the same as a company formed for such purposes by private covenant except that the District is a public corporation. The combined owners represented by the District must maintain the ditches, dikes and pumps, and furnish this service to the government. The government by taking the land took the benefit of these services and must pay therefor. So far, the United States has only proposed to pay for the fee simple title without the appurtenant easements.”

It will be remembered that the United States took this land adjoining the underpass by eminent domaine, subject to the easement of the drainage district. Now they seem to maintain that they can destroy this easement subjecting all of the other landowners in the district to the hazard of flood without assuming the responsibility therefor.

On page 52 the Appellee argues that the Appellants could probably have obtained permission from the Highway Commission to install a stop-log structure in the underpass or from the Housing Authority to strengthen

the ring levee itself if they desired to do so. Also that they were in a position to build such levees as they thought appropriate on their own property or on land east of the ring levee.

This appears to us to be a strange argument. In the first place, the Highway Commission did not own the underpass. It is shown that this underpass was a private way maintained by FPHA. In the second place what stop-log could be placed therein except by filling that underpass and rebuilding the embankment. What possibility could the other owners of the district have to obtain such a permit when that would in turn destroy the roadway through the underpass. As to building a new dike east of the Government's property, this would have necessitated cutting Peninsula District No. 2 in two. The Government in condemning the property along the underpass took 136 acres. So to build a new dike surrounding this would have meant the necessity of cutting off all of this property and subjecting the owners of the balance of the district to the expense of building an entirely new dike for its western protection and eliminating the western portion cutoff by the condemnation proceedings of the United States from contributing to the expense thereof. Following their theory further then, anyone located east of this new dike could in turn cut the same and subject still a smaller portion of the drainage district to the expense of building still a third dike and so on. If such theory were correct there would be little use for the formation of diking or irrigation districts and the vast amount of land that has been salvaged by such districts would be worthless.

No. 8. Appellants' reply to Item No. 8 of Appellee's brief in which they maintain that these cases relate to discretionary activity as to which there can be no liability under the Tort Claims Act.

As we understand the Appellee's contention, it is to the effect that wherever judgment is required for performance of any act then the Government is not responsible. If we follow this theory as they now contend, then it would seem there never would be occasion wherein the Government could be held liable for damages. No act so far as we know and certainly no construction is ever undertaken without the exercise of some judgment on the part of someone. The contention seems to be that since this is true then the United States may undertake anything it desires and since it requires the exercise of judgment, the United States cannot be held responsible. The District Court settled this question, we believe, accurately and in no uncertain terms. No cross-appeal has been taken by the Appellee and we believe this should dispose of this question. The Court in its opinion, beginning on page 136 of the record says:

“ * * * The exercise of administrative discretion as a result of ‘policy judgment and discretion’ may free the government from liability in handling explosives necessary for national defense in time of war. But the application of such a principle here or in the cases just mentioned would emasculate the statute and return us to the day when the sovereign could do no wrong.”

Also in the note numbered 20 at the bottom of page 136 where the Court says:

“Justice Jackson, dissenting in *Dalehite vs. United States*, 346 U. S. 15, p. 60, expresses a fear that the interpretation therein of the Tort Claims Act merely amends the ancient adage to read, ‘The King can do only little wrongs.’ ”

We submit that no case has been cited by Appellee and none can be wherein the Government can be relieved of liability under this provision for the commitment of a wrongful act for which there was no necessity.

No. 9. Appellants' reply to Appellee's contention No. 9 to the effect that these claims are barred by 33 U.S.C.A. 72 (c).

In this section the Appellee contends that so far as Government aid is concerned Peninsula District No. 1 is identical with Peninsula District No. 2 where Vanport was located. This section again demonstrates very clearly that they are basing their argument on the fallacious understanding that there is no difference between Peninsula District No. 1 and Peninsula District No. 2. In this case no Government aid was ever given for the construction of Denver Avenue embankment. They were not working upon it at the time and the flood was not occasioned by any acts of the Government in attempting to save Peninsula District No. 2 from flooding. In the Vanport cases the entire question was as to the breaking of the railway fill over which the Government had no control. During the flood fight they were working upon that fill and, as we understand that case, the plaintiffs were contending that the Government owed a duty to protect that fill. The District Court and this

Court properly held in our opinion that the act referred to by the Appellee relieved the Government from any claim for flood damage. These cases, however, are based upon an entirely different statement of facts. That the Government completely destroyed the embankment which the Peninsula District No. 2 had for its protection and it owed a duty to protect Peninsula District No. 2 by an embankment equivalent thereto and failing to do so it becomes liable for damages for this negligent omission.

In reading this argument of Appellee's counsel, we feel convinced that counsel for Appellee not only misled themselves but the District Court as well, by their theory that Peninsula District No. 2 in its reorganization plan was referring to and adopting the levees and fills surrounding Peninsula District No. 1 as its western protection. There was no reference or mention whatsoever in that proceeding as to Peninsula District No. 1 and only incidental mentioning of Multnomah District No. 1 lying to the east. Based upon this fallacy counsel for Appellee, as well as, in our opinion, the District Court was applying this provision to the breaking of the railway fills to the west and not applying it to the Denver Avenue embankment. We are convinced that the Court below was laboring under this fallacious understanding for the further reason that in determining the issues the Court below found that the breaking of the Denver Avenue embankment was the cause of the flooding of Peninsula District No. 2 lying behind the Denver Avenue embankment. We are unable to reconcile these findings except upon the theory counsel for Appellee, and the

District Court as well, were misled by this misunderstanding. Again we do not believe that this was an intentional misleading of the Court below any more than the repeated reference to this reorganization plan is intended to mislead this Court. However, counsel for Appellee have very obviously misled themselves into this fallacious position and innocently misled the District Court, so we believe.

This section referred to was passed in connection with the Government's work in aid of diking districts along the Mississippi. The Courts have held and we do not dispute their holdings, that this applies to the Columbia River. The only decision, however, that has interpreted this clearly and reasonably and with accuracy insofar as the facts in this case are concerned was the holding of this Court in the Vanport cases. *Clark v. United States*, 218 Fed. (2d) 446. The finding of this court in that case was cited in the Appellants' brief. It is to the effect that when Congress undertook to provide for aid by the Federal Government of diking districts, it should do so on a non-liability basis for damages which might result from such aid. In the present case there was no aid being given by the Federal Government. The claims of the Appellants are based upon the wrongful act of FPHA in destroying the Denver Avenue embankment which Peninsula District No. 2 had the right to rely upon. If the Government cannot be held in a case of this nature then they could cut the dikes of any diking district at any time, any place, in connection with anything that would be undertaken by the Government upon the whim of any Government agent or employee.

Any contractor building a housing unit or doing other work for the Government could, upon his own notion, cut any dike and thereby destroy any amount of property without the Federal Government being responsible for it and being liable therefor. To so hold would be, as the District Court said, to return to the day when the Government can do no wrong.

No. 10. Appellants' reply to Section No. 10 of Appellee's brief arguing to the effect that since the events of which the Appellants complain took place prior to January 1, 1945, the Court below had no jurisdiction to consider their claims.

When this underpass was constructed in the latter part of 1942 and the early part of 1943, it was a wrongful act giving rise to a claim for damages therefor by those who were affected thereby against the government. The only difficulty was that the only way citizens at that time could obtain redress was to ask Congress for it. The statute passed on January 1, 1945, 28 U.S.C.A. 1346 (b) gave citizens the right to sue the Government for damages from a negligent act. It was a provision applying only to jurisdiction. This section provides as follows:

"(b). Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, *accruing* on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the *negligent or wrongful act or omission* of any employee of the Government while acting within the scope of his office or employment, under circum-

stances where the United Staes, if a private person, would be liable to the claimant in accordance with the law of the place where *the act or omission* occurred." (Emphasis ours)

We call the Court's attention to the fact that this authority applies to damages "accruing" after January 1, 1945 and not from the date of the commission of the wrongful act. Here no damages accrued until the flood in 1948. In 1942 and 1943 the landowners in Peninsula District No. 2 might have been able to enjoin the construction of this underpass had they been given the opportunity to do so but they would have had no right to sue for damages, and in fact no damages could have been proved at that time. The damages did not consist in the removal of the embankment. The damages resulted and accrued from District No. 2 being flooded through this underpass in 1948.

We wish to call the Court's attention to the statement of the law on this subject in 5 ALR (2d) 307. On page 310 the law is summarized as follows:

"In many jurisdictions a distinction has been made between an original ('Permanent') injury from structures 'necessarily injurious' and injuries, described interchangeably as 'temporary,' 'transient,' 'recurring' or 'consequential,' caused by structures 'not necessarily injurious,' to the effect that the completion of a structure of the former kind puts in motion the limitation period for the entire cause of action, comprising the whole damage, past, present, and prospective, while, as to injury caused by a structure of the latter kind, only actual harm to the owner's land caused by overflow can put the limitation period in motion. Other courts take the view that, irrespective of the nature of the injury,

a cause of action cannot accrue nor the limitation period commence to run before actual harm is inflicted to the plaintiff's land."

Also on page 311 is the following:

"As a practical matter, the owner of land has generally no chance whatsoever of successfully suing, let alone recovering a substantial amount in damages, before his land has been actually harmed by overflow, no matter how easy it is to say after the event that he should have foreseen it. It is therefore submitted that no general rule should be adopted which would impose upon him the unfair burden to sue at a time when as a matter of reality his chance of a fair recover is so slim and that, as a general proposition, his cause of action does not accrue, and the limitation period does not commence to run, before his land has been actually harmed by overflow."

A similar situation was before the Court in *Atchison, T. & S. F. R. Co. v. Eldridge*, 41 Okla. 463, 139 P. 254, where the Court said:

"It strikes us as unreasonable to argue that a cause of action is barred by limitation before it arises. The facts in the case at bar do not disclose that plaintiff ever sustained any damage prior to the overflow complained of, and if the embankment in question, be it ever so negligently constructed, had been maintained for a century, the plaintiff would have had no cause of action for damages sustained until they were sustained; hence his right of action necessarily dated from the date of his injuries:"

Since the statute provides that the District Court shall have jurisdiction for all damages "accruing" after January 1, 1945, and the authorities universally hold that no action for damages would lie similar to the instant case until the flood, there can be no question that

the Court had jurisdiction in this case. Appellee has quoted many cases. The only one, however, from which any quotation is taken is the case of Rankin v. De Bare, 271 P. 1050-1051. This is a case wherein the defendant built a building on his own property which encroached upon the plaintiff's property by one to two inches. This was a permanent structure and all the damage that resulted to the plaintiff resulted immediately upon its construction. The Court held properly in this case that his action started to run at the time the property was taken. Any different holding in this would have been unrealistic. It has, however, no bearing on the issues in this case. We find no case cited by the Appellee that would have any bearing on the situation as it exists here.

We call the Court's attention also to the fact that this legal point was settled by the District Court and no cross-appeal was taken therefrom by the Appellee.

No. 11. Appellants' reply to Item No. 11 of Appellee's brief to the effect that the Appellants assumed the risk of flood loss.

They contend that the immediate cause of damage to property lying east of Union Avenue was not the failure of the ring levee but the failure of Union Avenue fill.

Union Avenue is a street or highway running through the center of Peninsula District No. 2. It is built on an embankment because otherwise it would be continuously flooded. Union Avenue, however, had two culverts through it and an underpass (R. 56) (R. 454-455). Obviously it was not relied upon or considered as flood pro-

tection. The supervisors of Peninsula District No. 2 called attention to this in their resolution to the effect that Union Avenue was not relied upon as any flood protection (R. 342). Drainage District No. 2 neither had nor claimed any easement thereon. Appellee apparently tries to relieve itself of a portion of the damages resulting to Peninsula District No. 2 by this contention that Union Avenue was the protection afforded to that portion of Peninsula District No. 2 which lies east thereof. We see no merit whatsoever in this contention. No one in the district ever considered the Union Avenue fill as any protection. And it did not constitute any portion of the dikes surrounding the district. It is shown in the flood report that in an effort to mitigate the damages an attempt was made to plug the underpass thereunder and to also plug the culverts in an attempt to save the property east thereof from the damage resulting from the flood. This, however, proved impossible.

Appellee next contends in this same section that of the properties within Peninsula District No. 2 some of them were purchased and some improved after the construction of the underpass. They contend that those people assumed the risk. This is a strange theory. The law is, of course, that every parcel of land within a drainage district is entitled to the protection of the dikes and when they are destroyed improperly the one so destroying them is responsible for the damages and owes a duty to the entire district to protect it. If the Appellee's theory is correct then anyone can destroy a dike at any time, disregarding the protection which the properties within the district had and the one destroying the dike would

only be liable for the property as it was at that time, regardless of when the damages resulted and the cause of action accrued. The owner of property within a diking district has the right to improve and the right to sell. If the Appellee's theory is correct, however, this would prevent any improvements to property or any sale thereof after destroying of a dike as was done in this instance. Of course, that would be against public policy.

It is particularly true in this case, that no such theory could possibly lie for the reason that the Appellee did cause to be constructed a ring levee surrounding the underpass, which to the layman's eye, was sufficient protection but because of concealed defects gave them no protection whatsoever, thus lulling them into a sense of security. We call the Court's attention to the comparison of dikes set forth in Appellants' original brief, Item No. 4 of the argument.

No. 12. Appellants' reply to Item No. 12 of Appellee's brief to the effect that nothing in Appellants' brief justifies a decision in their favor.

So far as Appellants can see this is the only place in the Appellee's brief where they have attempted at all to support any of the findings in the case to which the Appellants so strenuously object, and in this section they only attempt to support the findings by repeating them. The Appellee had from February 22, the date of the opinion of the Court below, to September 14, the date of signing the findings, to draw the factual statements that would support the decree. Two attempts were made,

the file will show, which after objections were discarded. On the third attempt the findings were prepared, presented and signed as of the same day, September 14, 1954, giving no opportunity to object thereto. Now, it would appear that Appellee desires to make the fourth attempt to find some facts which would support the decree. The only thing they have added, or attempted to add, is their interpretation as to what happened on the reorganization of Peninsula District No. 2. As has been repeatedly pointed out this is a fallacious misleading statement based upon written and precise language. Apparently Appellee's brief in its entirety is based upon the theory that in this reorganization Peninsula District No. 2 referred to and adopted the levees and fills surrounding Peninsula District No. 1 as its western protection. Whereas in fact, no mention or reference whatsoever was made in that reorganization to Peninsula District No. 1 or to its levees or fills, the reference having been to Multnomah District No. 1 located to the east. The western protection referred to in that reorganization was clearly the Denver Avenue embankment and it was the desire of District No. 2 that its own outside dikes be brought up to the standard and height of that embankment so as to give the district the same protection from the north, south and east as it had on the west by this embankment.

CONCLUSION

The predicament of the Appellee is quite obvious. Every legal principle involved was determined by the District Court in favor of the Appellants. There was no dispute in the evidence as to any material fact. When these legal principles are applied to the undisputed facts there is no possible leeway by which judgment could be rendered otherwise than for the Appellants. Yet the reverse was true. The effort on the part of Appellee seems to have been throughout the proceeding, and still is, to confuse the facts for the apparent purpose of finding some face-saving excuses for the agents and employees of the United States for subjecting the Government to the payment of damages on account of their negligent omission of their duties, and subjecting the residents and landowners of Peninsula District No. 2, their families, grade school and homes and industries to the horrible ravages of floods, while at the same time lulling them into a sense of security. Face saving excuses, however, even if they were justified from the undisputed facts, are not sufficient to relieve the government from liability for the damages resulting to those in Peninsula District No. 2.

Realizing that there is nothing in the undisputed statement of facts that could justify judgment for the Appellee, the Appellee has attacked in its brief and asked this Court to reverse the District Court as to the legal principles determined by it. They have cited in their brief 144 cases and 36 statutes and regulations in an

effort to reverse the District Court on legal principles announced by that Court and as to which no cross-appeal has been taken. We have considered all of these cases, statutes and regulations and we are unable to find one that applies to the situation in this case, when you acknowledge the true and undisputed statement of facts.

We respectfully submit that the District Court should be reversed and that these cases should be referred back to the District Court for determination of the damages suffered by each of the Plaintiffs and Appellants.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

MEARL C. TILLMAN and EMILY P. TILLMAN,
Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

(And Related Cases)

PETITION FOR REHEARING EN BANC

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PETITION FOR REHEARING EN BANC

To the Honorable Circuit Judges, HEALY and CHAMBERS and District Judge, HARRISON:

Now comes the appellants in the above entitled cause and respectfully petition the Court for a rehearing en banc. Sufficient reasons for this petition we believe will be revealed by this statement.

It seems the question here involved is, "Can the Government do wrong?"

We are thoroughly convinced that an opinion favoring the appellee cannot be written with acknowledgement

of the undisputed facts and the all important Oregon statute that can be cited for anything except to answer this question in the negative.

This is the second time in approximately forty-seven years of practice the writer has felt compelled to file a petition for rehearing in any appellate court.

There are fifty-two claimants involved in this proceeding, including Columbia Edgewater Country Club with some 450 or 500 owner members. They have suffered a loss of considerably in excess of one million dollars. These claimants and their families have been brought up as all Americans with the full faith and belief that they will not be deprived of either their life, liberty or property without a fair trial and that the federal courts assure the protection of these rights.

This case involves entirely a question of facts. The issues are whether the claimants had the right to depend upon the Denver Avenue embankment for protection against floods and whether this protection was wrongfully destroyed by the Government's agents, FPHA.

If the issues were considered by the Court in view of the facts as set forth in the pre-trial order and the Court determined that there was no legal liability involved on the part of the Government, then these claimants would be able to understand the reason for their claim being rejected. The issues, however, were entirely evaded and the facts set forth in the pre-trial order which are unquestionable were not only ignored but contradicted, both in the District Court and in this

Court. The express contract giving the landowners the right to use the embankment for which a substantial consideration was paid was emasculated by the District Court and completely ignored by this Court. The all important statute of the State of Oregon imposing a duty on the Government to substitute equal protection when the underpass was constructed was completely ignored by both Courts. These are facts and not law. These claimants can understand these facts as well as anyone else—a legal education is not necessary for that purpose. It is only a matter of common sense on which the legal profession has no monopoly. They know that when the issues are evaded by holding that the breaking of the railway fill on the western side of District No. 1 and a mile or two miles outside of their own district was the sole cause of the flooding, that they have not had a hearing on the issues presented. They know that the breaking of the railway fill was the cause of the flooding of District No. 2 only because the Denver Avenue embankment was destroyed wrongfully by the FPHA with no provision for substitute protection. They also know and are in a much better position to know than the Court that when it is said that they did not depend upon the Denver Avenue embankment for protection that it is not true. How can it be explained to these people that they have had a fair trial and lost their case when they know that the issues are evaded by holding that the breaking of the railway fill was the sole cause of the flooding of their property? How can it be explained to them that they have had a fair trial when they know that the facts found by the

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Court are not true, that they are contradicted by the undisputed evidence contained in the unquestionable pre-trial order?

When this case was tried in the District Court and proposed findings were presented by counsel for appellee, counsel for appellants made strenuous objections thereto, pointing out that there were twenty-nine places in the opinion where the statements of facts made were erroneous and that they contradicted in many places the undisputed evidence contained in the pre-trial order and the balance were unsupported. Thereafter, the District Court requested counsel for the appellants, through the Clerk of the Court, to prepare findings that would support the opinion. Thereupon counsel for appellants prepared findings which were as near as possible a word for word copy of the agreed and material facts in the undisputable pre-trial order. These findings could not possibly support the opinion and of course were not signed.

Later counsel were notified there would be a hearing on the 14th day of September. Counsel for both appellants and appellee were present for that hearing but no hearing was held. Instead the Court requested counsel for both parties to prepare findings which would support the opinion. These facts are not in the printed record but are in the files.

Counsel for appellants could not agree to any finding that contradicted or were unsupported by the pre-trial order and the evidence submitted but were willing to agree to any provision therein to be inserted in the find-

ings. Counsel for appellee thereupon drew the findings and each and all of the factual statements therein contained were taken from the twenty-nine erroneous factual statements in the opinion. None of the material findings were from the pre-trial order or the oral testimony.

The findings finally prepared by counsel for appellee and signed by the District Court were substantially the same findings as those originally prepared with which the appellants have so strenuously objected and which the Court refused to sign over their objections.

In filing this appeal we assigned as error substantially every factual statement made in the opinion as well as in the findings of fact which were signed by the District Court. To our surprise and amazement these assignments of error are disposed of by this Court in the following language:

“Without setting forth each assignment of error, suffice it to say the findings of the trial court are fully substantiated by the transcript of the record.”
(Page 4, Opinion)

In the very preceding paragraph in this opinion this Court says:

“A pre-trial order, prepared with meticulous care, was filed in this case and constituted almost the entire evidence. There was little oral evidence offered and admitted in addition to the pre-trial order, which does not add to or detract from the facts set forth in the pre-trial order.”

All of appellants' assignments of error were attacking the facts found by the District Court as being contra-

dictory and not supported by the pre-trial order. Each of these assignments are well founded. This Court says the pre-trial order was meticulously drawn and it of course cannot be disputed. This Court eliminates all of appellants' assignments of error by holding the District Court's findings are fully substantiated. The Court seems to avoid stating the facts as they appear in the meticulous and undisputed pre-trial order. Not one of appellants' assignments of error is considered and no attempt whatever is made to substantiate the Court's finding by the meticulous pre-trial order. The appellants cannot have a hearing by this process of elimination and the ignoring of the Oregon statutes.

FACTS MAKING UP THE ISSUES

Now we ask this Court to consider the issues in this case and to apply the facts as developed from the pre-trial order and the evidence which this Court has already recognized as being meticulously prepared. The undisputable facts developed by the pre-trial order and the evidence are as follows:

1. In 1915 the Peninsula Industrial Company was the owner of the land going to make up Peninsula District No. 1 and Peninsula District No. 2. This was a sizeable piece of ground subject to annual floods.

2. These floods are caused by the melting of snows in the vast area drained by the Columbia River. There are some 259,000 square miles in this area including the area from the summit of the Rocky Mountains to the Pacific

Coast on the West and from far into Canada on the North to Nevada on the South. The height of these floods depends entirely upon the melting of the snows in these areas and when sufficient of the areas are melted for the water to reach Portland at the same time there is a high flood. The 1948 flood was about the second highest flood but there is always every few years a very high flood and always a potential high flood in these mountainous areas.

3. In 1915 Peninsula Industrial Company conveyed two strips of land to the County of Multnomah eighty feet in width and together approximately three miles in length (Deed R. 455-465). Parcel A in the deed is Union Avenue and Parcel B is Denver Avenue. The county was given the right to slough over fills on to the private grounds for the sole and only purpose of maintaining a highway over the top. The fills were sloughed over until it took a width of 317.6 feet for Denver Avenue (R. 23) and approximately 125 feet on Union Avenue (R. 55) (Appendix A App. Br.).

4. The sole consideration for this deed was that the county agreed to construct and maintain an embankment over Parcel B (Denver Avenue) equal to the bridge approach (R. 23).

5. The deed provided for mutual easements. The Peninsula Industrial Company and its successors in title were entitled to make use of the bank and hook on to it (R. 24). The County had the right to maintain a highway over the top of the embankment placed upon the private grounds and had no other rights. This arrange-

ment also provided mutual protection against high floods that were always anticipated. If the landowners built dikes around the perimeter these dikes would give added protection for the highway. If such dikes were not built on one side or the dikes broke on one side this highway embankment would protect the other.

6. The appellants in this case are all owners of parcels of land within District No. 2 and have the rights provided by that deed as successors of the Peninsula Industrial Company.

7. In 1917 Peninsula District No. 2 was organized (R. 17) in which they adopted the Denver Avenue embankment as its western border and the Court found that it was protected on various sides and places by embankments already in place which would include the Denver Avenue embankment (R. 332-333). From this time on every landowner in District No. 2 was endowed with the right to have all dikes maintained, including Denver Avenue embankment.

8. This Denver Avenue embankment was the only protection that Peninsula District No. 2 had from flood waters from the west. This embankment was built ultimately to a height of 37.6 feet and it was more than three times the width and strength of the strongest portion of the strongest dike on its perimeter and it was built in the identical manner. (See Comparison of Dikes, Appellants' Brief, Item 4, pages 56-62).

9. Peninsula District No. 1 was organized also in 1917 and adopted Denver Avenue embankment as its

eastern protection (R. 17). The rights of the two districts in this Denver Avenue embankment were identical. They were derived from the same instrument.

10. The statutes of the State of Oregon provide that where the owner of a parcel of land in a diking district over which any dike of the district exists, has the right to change the dike and prescribes the manner in which it can be done (ORS 551.140, OCLA 123-216).

11. This statute provides that in order to destroy a dike at any point the owner of the property desiring it to be done must apply to the County Court, (or the Circuit Court in Multnomah County) for permission to do so and must get the permission of the Court.

12. The same statute also provides that if such is done by any owner of any parcel, then it owes the duty to substitute for the dike to be removed another dike of equal protection and to give unto the district the same rights as it had over the original.

13. Peninsula District No. 1 had no protection on the west except for railway fills which were of questionable value and over which they had no authority whatsoever (R. 30). They had no right to connect to this railway fill nor to depend upon it.

14. Peninsula District No. 1 with no protection except the railway fills remained a swampland until FPHA acquired the title to approximately eighty per cent thereof to build a temporary housing project. Since the washing out of Vanport by the 1948 flood it has again reverted to swampland.

15. Peninsula District No. 2 on the other hand, with the protection on the west of Denver Avenue embankment three and one-half times the size and strength and built in the identical manner as the outside dikes, was completely developed (Completion Report by Government Engineer Dibblee, R. 450). Many homes and industries were built therein and a grade school was built behind this Denver Avenue embankment for the schooling of the many children of the many families living therein.

16. In 1942 Kaiser Company, contractor for the Government, constructed a housing project in District No. 1 for temporary war purposes.

17. Someone seemed to have thought that they needed an underpass through Denver Avenue embankment so as to enable residents of Vanport coming from the Portland side to enter into the Vanport area without crossing traffic. Such an underpass could have been provided for entrance to the Vanport area at the south side of District No. 2 where an underpass was constructed by the Highway Commission with full protection to District No. 2 (R. 29). Entrance could also have been made to the Vanport area at the north end near the bridge through the underpass constructed by the Highway Commission which was also protected by the high ground and fills (R. 28). It could also have been protected by a very minor provision for stop lights at the point. Vanport had other modes of entry and exit so this underpass was not necessary but only desired by FPHA.

18. This underpass was constructed without any authority whatsoever except a permit from the Highway Commission which had no authority over the ground except to maintain a highway over the top (R. 293). It was constructed three-fourths on private property (the embankment) with no consent whatever from the land-owners.

19. In constructing this underpass they made no attempt whatsoever to procure the consent of the Circuit Court as required by the statutes of the State of Oregon (R. 48).

20. They made no attempt whatsoever to provide a substitute dike of equal protection as required by the same statute (R. 53).

21. A ring dike around this underpass was constructed by FPHA, an agent of the Government, for the sole purpose of protecting its own dollar investment in Peninsula District No. 1 (R. 97, Cont. No. 23).

22. This ring dike gave no protection whatsoever to District No. 2 for the reason that it had a hidden culvert under it which permitted the flow freely of water from west to east but had a flood gate preventing the flow of water from east to west (R. 53). Also it had a clay blanket on the east to protect from water on the east but no similar protection on the west (R. 52). It was not even contended by the appellee that this ring dike gave any protection whatsoever to District No. 2. In fact, it was one of their express contentions that it was not so intended and no one was ever authorized to do anything for the protection of District No. 2 (R. 97).

23. The rights of Peninsula District No. 1 and Peninsula District No. 2 were identical. These rights stem from the original deed from the Peninsula Industrial Company to Multnomah County giving the same rights to the landowners on either side of the Denver Avenue embankment.

24. By this act the appellee, through its agent FPHA, stole the protection that Denver Avenue embankment afforded from District No. 2 completely and adopted it for its own protection in Peninsula District No. 1. They had to consider that the Denver Avenue embankment was sufficient to withstand any flood waters from either side in the event of a break of any of the dikes. In fact, it was sufficient and did withstand the flood of 1948. The flood waters completely flooding Peninsula District No. 2 came through the underpass and they got no flood waters from any other source (R. 82).

25. In constructing this underpass the appellee, through its agent completely destroyed the easement which District No. 2 had upon the Denver Avenue embankment making it worthless and useless. Also the Government in taking the land, upon which this ring dike was built on the east side of Denver Avenue embankment, took it subject to the easement which Peninsula District No. 2 had to make use of this embankment for its protection (R. 471-472).

26. From the time of the organization of Peninsula District No. 2 in 1917 Denver Avenue embankment was always recognized as the primary and only dike protecting Peninsula District No. 2 on the west. The High-

way Commission had built two other underpasses, one on the south and one on the north of the district, both of which the Highway Commission protected against floods (R. 28-29).

27. The Denver Avenue embankment might be considered as a secondary dike for protection from floods coming from the west as to that portion of it lying between the north and south dikes of District No. 1 because until the railway fill or dikes in District No. 1 broke there would be no water against this dike. However, Mr. Turnbull, one of the expert witnesses for the appellee testified that it would be wrongful to cut a secondary dike (R. 244). However that may be, Denver Avenue embankment was the only and therefore the primary dike of District No. 2 protecting it on the west.

28. The "meticulous" pre-trial order provides that the dikes and railway fills around District No. 1 were protection to District No. 2 only in the sense that in the absence of a failure of those dikes or fills flood waters could not approach Denver Avenue (R. 29-30, Sub. 8). No contention is made by the appellee that District No. 2 depended on District No. 1's outside dikes or railway fills.

29. Floods in the Columbia River are as certain as the arrival of the time in Spring when the snows of the vast mountainous areas begin to melt. There is always a fight to protect all dikes, primary or secondary, during these flood periods and it is extremely wrongful and negligent to destroy any of these protections whether they be primary or secondary. Government engineer

Dibblee in his flood report recommends the elimination of this underpass (R. 459).

30. After the cutting of this underpass, there was no way whatsoever that Peninsula District No. 2 could protect itself against floods from the west. Denver Avenue embankment was its western boundary. The Government condemned the land bordering on the underpass to build a dike for its own protection only. The railway fill was in the hands of the railway company and located some mile or two outside of the district. Even if it had been within the bounds of reason and possibilities for Peninsula District No. 2 to finance a new dike, there would be no way of it condemning the railway fill or the highway, or the ring dike built on Government property. There was no other place where a dike could be built except by cutting its district in two and going to the enormous expense of duplicating the Denver Avenue embankment with a portion of its district eliminated from participation therein. And then, if this case is any authority, there would be no protection against the Government, or one of its agents or anyone else, deciding they wanted another underpass through such new dike or for that matter through any of its dikes. The Highway Commission maintains a highway over its dike along the Columbia River with the same rights it had over Denver Avenue. What is to stop the Highway Commission from cutting an underpass through it or granting a permit therefor?

These are the facts which are set forth in the "meticulous" pre-trial order and in the evidence. They are un-

disputed as has already been said by this Court. These are the facts upon which the plaintiffs rely. These are the facts upon which the issues are formed and there is nothing in the pleadings, either the complaint or the answer, nor in the contentions of either party that deny these issues or justifies the Court in evading them. The appellee was represented by highly competent counsel. If there had been any grounds to base a contention that the breaking of the railway fill was the sole cause of the flooding of District No. 2 or that District No. 2 depended on the fills and not Denver Avenue, they would have made that contention. It would not have been necessary for this Court or the District Court to create that as an issue.

We believe it would be helpful to the Court considering this case if the Court will refer to the composite map of Peninsula Districts No. 1 and 2, Appendix A of appellants' brief.

CONFUSION AS TO EVIDENCE

Counsel for appellee, during the course of the trial, became confused and represented to the Court that when Peninsula District No. 2 was reorganized in 1928 that in their application for the reorganization they referred to the dikes surrounding Peninsula District No. 1 on the west and the language of that instrument considered Peninsula District No. 1 and No. 2 as the same thing, each protecting the other. We are satisfied that the District Court became confused by these representations. These representations were due entirely to the confu-

sion of counsel for appellee with no intention whatsoever of misleading the Court or misrepresenting it. However, the results seem to have been the same as the District Court in its opinion seemed to indicate that it believed that the two districts were the same and depended upon each other, and this Court has adopted the same theory.

Mr. Lowry, counsel for appellee, prepared appellee's brief in this Court. He referred throughout his brief and quoted several times this reorganization proceeding quoting it as referring to Peninsula District No. 1's dikes as protecting District No. 2 on the west. No such language appears in this reorganization proceeding. The reference was to Multnomah District No. 1 lying to the east, not to Peninsula District No. 1 lying to the west. The confusion came about from all parties referring to these two diking districts as District No. 1 and District No. 2. Mr. Lowry freely admits his error although since he has filed no additional brief it does not appear in the record.

In order to surely disabuse this Court's mind of this confusion the appellants used the first five and one-half pages of their reply brief to call attention to this error and referred to the error continuously through that reply brief. Apparently we were still not successful in disabusing the Court's mind of this confusion.

There were other reasons which might have caused some confusion. The pre-trial order was made up very largely of facts which had nothing whatsoever to do with the issues: reference to the railway fills, the dikes

surrounding District No. 1, the organization of FPHA and HAP and the vast amount of material which had something to do with the Vanport cases and nothing whatsoever to do with this case was immaterial. Once unofficially the appellants objected to the appellee placing this material in the pre-trial order as well as the mass of exhibits which had no bearing on the case. But they were advised by the Court that it would permit the Government to place these facts in the pre-trial order. After that no objections were made and this accounts for the vast amount of material in the pre-trial order and the mass of exhibits which had no bearing on the case being in the record. As a matter of fact, the material matter in the pre-trial order takes only a few pages. This necessarily made the record so large that it was perhaps discouraging to the Court to pick out the material things and therefore somewhat confusing.

FACTS FOUND BY THIS COURT

Now let us consider the factual findings that were made by this Court in its opinion, taking the statements in the order in which they appear:

1. In the third paragraph on page 2 of the opinion this Court finds that the underpass was constructed for the convenience of those living in Drainage District No. 2.

This statement is simply not true. There is nothing in the "meticulous" pre-trial order or in the evidence that would justify any such conclusion. The physical

conditions in the area absolutely controverts this statement. The underpass was blocked on the east by the ring dike constructed by the Government so there was no entrance through this underpass from one district to the other and could not be. Those living in District No. 2 would have no more use for the underpass than any ordinary member of the public and they would have to go a roundabout way to get to it. There is no showing that any district official or any person living therein had any purpose to use this underpass, and it is doubtful if any of them ever passed through it. This statement was taken by this Court not from the "meticulous" pre-trial order but from the opinion of the District Court on page 129 of the Record. There was no justification whatsoever for such a finding by the District Court and no justification for this Court making the same finding except this erroneous statement by the District Court.

2. In the very next paragraph appearing on page 2 of this opinion, the Court finds that the State Highway Commission constructed this underpass. There is likewise no justification for this statement. The Government's agents requested the State Highway Commission for permission to construct an underpass, which they had no right to grant. There is no justification for this statement that it was constructed by the Commission. The permit on page 293 of the Record shows only that condition that the Highway Commission would look to its upkeep only during the period of the war at the expense of FPHA. The Commission had nothing to do

FPHA was permitted to construct an underpass on the whatsoever with the construction of the underpass except that it did prepare plans, at the request of FPHA, and did loan to FPHA an engineer to supervise the construction as an employee of FPHA.

3. This court in its opinion on page 2 at the bottom paragraph referring to the dikes surrounding District No. 1 makes this statement:

“The same works protected District No. 2 on its western side. District No. 2 between 1917 and 1921 built dikes on its north, south and east sides which connected with the works of District No. 1, thus completely surrounding both districts. Neither district spent time nor money in attempting to strengthen the mound-fill upon which Denver Avenue is located. At no time was any request made of any one that the Denver Avenue fill be strengthened as a part of the protection to be afforded said Drainage District No. 2.”

Here again there is no justification whatsoever that can be found in the “meticulous” pre-trial order which justifies the statement. It was true that so long as there was no break in the dikes or railway fills surrounding District No. 1 there would be no flood waters against that portion of this embankment which lies between the north and south dike of District No. 1. However, the dikes of District No. 1 did not joint with District No. 2. The maps and records show that the south dike of District No. 1 was some 400 feet or so north of the south dike of District No. 2 so that even considering that the dikes around Peninsula District No. 1 were some protection to District No. 2, it would still be only a partial

protection. Also there is no evidence whatsoever that District No. 2 placed any reliance on the dikes of District No. 1.

Now as to the statement that no request was made of anyone to strengthen the Denver Avenue embankment and no money was paid by either district in attempting to strengthen it; the Court should remember that the "meticulous" pre-trial order sets forth in specific terms an agreement on the part of the county to maintain this embankment equal to the bridge approach and it was maintained to a height of $37\frac{1}{2}$ feet and to a width of over three times the strongest portion of the strongest dike on the outside of the district and it was built in the identical manner (See Comparison of Dikes, App. Brief 56-62). The only time a request was made to the Government engineers to assist the district in improving its outside dikes springs from the reorganization of District No. 2 in 1928. That petition was filed in the Circuit Court of Multnomah County requesting permission for the district to increase its outside dikes to the equivalent of the Denver Avenue embankment (R. 25-27). They were given this permission together with permission to assess themselves \$25.00 per acre for that purpose. This was apparently not sufficient and the aid of the Government was granted. Thereafter they did improve the outside dikes to the equivalent of Denver Avenue embankment (R. 19-21).

Now when it is considered that the request was only to bring up the outside dikes to the equivalent of Denver Avenue embankment it appears obvious that the Gov-

ernment engineers would have taken a dim view of spending money to improve the Denver Avenue embankment when they were only bringing the outside dikes to the equivalent of Denver Avenue embankment. It would have been an absurdity for the District to have spent time or money improving Denver Avenue embankment or to request the Government to do so. This becomes more absurd when it is recognized that the State Highway Commission during the same period did actually increase the size and strength of Denver Avenue embankment by building it up from 33 feet at that time to 37.6 feet (R. 22). This is all set out in the "meticulous" pre-trial order. There is no source for this finding by this Court to have been taken except from the District Court's opinion appearing on page 128 of the Record. This is one of the twenty-nine unsupported findings of the District Court to which reference has already been made.

4. In the next paragraph at the top of page 3 of the opinion this Court does recognize that the ring dike was built only to afford protection to District No. 1 and possible overflow of waters from the east in the event of failure of the dikes in District No. 2. Then the Court makes this statement:

"Subsequent events disclosed it did afford some protection to the properties located in District No. 2."

This statement is also taken from the District Court's opinion on page 130 of the Record where the District Court said that this ring dike did in fact afford some pro-

tection since it delayed the waters for thirty hours so that District No. 2 was not flooded for thirty hours after District No. 1. It should be remembered that the residents of District No. 2 had spent millions of dollars in improvements to their property; that there were so many residents that they built a grade school for the schooling of their children. This flood happened on a holiday so that the children were not in school. It can be imagined what a tragedy this might have been had this dike broken on some other day than a holiday and what a future tragedy there can be. It was only contended as we understand it by the appellee and by the District Court and now by this Court that this thirty hours gave the residents an opportunity to save their lives and perhaps to salvage some of their personal property. No damage is being claimed for the lives that were saved or the personal property that was salvaged. Damage is being claimed for the destruction of the millions of dollars of personal and real property which was flooded and the destruction of their homes. It appears only accidental that this embankment delayed the water even for thirty hours as this ring dike was constructed only for the purpose of delaying waters coming from the east. In fact, no engineer, no witness, makes any claim for it that it was of any service against waters coming from the west. How can some 500 people be appeased after the destruction of their property by the removal of the strongest dike they had by telling them they should be happy because of the accidental delaying of the flood by this "one way dike," thus enabling them to save their lives and salvage some of their

movable personal property. What possible legal defense can be claimed for this accidental delay? These people all know that they had a dike in Denver Avenue embankment which they had depended upon since the organization of the district in 1917. They all know that it was strong enough to withstand this flood and that that was proven by the fact that the embankment did stand up and no water flooded onto District No. 2 except through the underpass. They all know that this embankment was over three times the size and strength of any in the district, all of which held. Is it possible for this Court or any court to hold that anyone can remove a dike which has been provided by a drainage district if they delay the waters for a few hours so that the residents may save their lives?

5. In the next paragraph on page 3 of the opinion the Court says that on May 30, 1948 an unprecedented flood on the river occurred. This is not true. The "meticulous" pre-trial order shows that a flood occurs in the Columbia every year as certain as the year rolls around. Its height is never predictable because it is caused from the melting of the snows from 259,000 square miles of area, mostly mountainous, and the height of the flood depends upon the weather conditions that may cause the snow in a great portion of this area to melt at about the same time so that the water therefrom reaches Portland at the same time. It is true that this was one of the largest floods but a high flood, it is shown by the record, occurs quite frequently and there is always a potential high flood in this mountainous area.

At this point we would like to call the Court's attention to what the Honorable Judge James Alger Fee said in the case of *Clark v. United States*, 109 Fed. Supp. 227, which were the Vanport cases.

"Each of plaintiffs could have found as easily as other persons in the area that the Columbia has from time to time been subject to tremendously high water. * * * This fact has been of national importance. The Court would take judicial notice of this fact as well as of the floods in the Mississippi. It could have been ascertained by any plaintiff as a matter of general knowledge that such floods do overtop and break down protective works and dikes. * * *"

6. In this same paragraph above quoted from, the second paragraph on page 3 of the opinion, this Court says:

"District No. 2 was protected by the Denver Avenue fill until the next day, May 31st, when the ring levee constructed at the east of the underpass gave way, and as a result District No. 2 was also flooded."

Thus it appears that this Court recognizes that the flooding of District No. 2 was due to the underpass and to the inadequate protection given by the ring dike and it would seem to be entirely contradictory to the statement made in the fifth paragraph falling on page 3 of the opinion as follows:

"The breaking of the railroad embankment was the sole cause of the flooding of District No. 2."

7. In the fourth paragraph of the opinion this Court says:

"* * * these landowners or their predecessors were endowed with certain powers and charged with the

responsibility of taking the necessary action to protect lands within their respective districts and had the authority to levy assessments to do so."

It is true that they do have such authority but why does the Court ignore the fact that they did protect District No. 2 with an embankment on the west known as Denver Avenue embankment when they made an agreement with the county to construct and maintain this embankment giving them the privilege to use it, paying a valuable consideration for it. Thus they had provided protection but why does the Court completely ignore this all important written agreement? What difference could it have possibly made had the district constructed this same embankment with no highways running over in and at their own expense? There was a situation here where the county and the Highway Commission had to build an embankment for the interstate bridge approach. It is running over ground that was necessarily overflowed every year and had to be water proof. Under the situation where this embankment could act both as a highway and as a dike, both parties concerned, the county and the district, were willing for it to perform such a dual purpose and expressly agreed to it. It would have been ridiculous for District No. 2 to have duplicated this embankment even though they might have been able to accept the impossible and raise the enormous funds necessary therefor. What right could any third party gain to destroy this embankment at the expense of District No. 2 and what possible facts can be developed therefrom that would justify a Court in holding that it could be cut by anyone without authority and

with immunity? What possible reasons can the Court find for ignoring such an express and all important agreement and the rights therein granted?

8. In the next paragraph in this opinion on page 3 this Court says:

“District No. 2 depended on the western embankment of District No. 1 to protect it from overflow from the west. The breaking of the railroad embankment was the sole cause of the flooding of District No. 2 * * *”

There is no authority whatsoever in the “meticulous” pre-trial order to justify any such conclusion and had there been the very competent counsel for the appellee would have raised the point. The Court has taken this statement from the opinion of the District Court (Page 133 of the Record). The Honorable James Alger Fee wrote the opinion in *Clark v. United States*, 109 Fed. Supp. 213. This opinion shows an exhaustive study of the facts involving the Vanport cases and involving this same flood. If the same exhaustive study had been made of the issues and the facts in this case we feel certain that the ruling would have been different. We call the Court’s attention to what was said in that case, page 220, and we quote:

“The ground should be cleared first. Denver Avenue fill broke after Vanport was flooded, so no causal connection between that incident and any property damage here complained of can be established.”

Thus it seems that both the District Court and this Court recognize that there was no connection between the breaking of the railway fill and the breaking of

Denver Avenue embankment but at the same time it is held in both courts that the breaking of the railway fill was the sole cause of the damage to the property lying east of Denver Avenue embankment. Thus it would seem that the Court contradicts itself. The breaking of the railway fill, of course, was not the cause of the flooding of District No. 2 except for the fact that the protection of Denver Avenue embankment had been destroyed and the flood rushed freely through this underpass. There was no contention by the Government or by anyone else and no evidence produced in this case whatsoever and nothing is to be found in the "meticulous" pre-trial order that raises any issue whatsoever as to the breaking of the railway fill nor that that was the cause of the flooding of District No. 2.

Can these 500 people be satisfied by telling them that the sole cause of the destruction of their homes was the breaking of the railway fill? The Court could just as well say that the sole cause of the flooding was the accumulation of the winter snows over this vast mountainous area. Can these people be satisfied that they have had a trial of their cause when they know these statements are not a fact? When they know that they had ample protection, for which a valuable consideration had been paid, and that it was destroyed without authority and in violation of the statutes of the State of Oregon?

9. In the next paragraph on page 3 the Court says that the Federal Government did not construct or have any control over Denver Avenue or the underpass. This

is true as to Denver Avenue but it is not true as to the underpass. The underpass was on ground belonging to the Government and was constructed by the Government and was cared for at its own expense. It was nothing but a private right of way to the housing project.

10. In the same paragraph this Court says:

“While the federal government paid for the construction of the ring levee and it stood upon government owned land, it was never relied upon by District No. 2 for protection. If any reliance was placed thereon, it was by District No. 1.”

The “meticulous” pre-trial order shows that District No. 2 relied upon Denver Avenue embankment from the time of its organization in 1917. It shows that when the ring levee was constructed that from its size it would appear to a layman that it was sufficient to protect against this underpass. It shows there were concealed defects in it which made it useful only to protect water from the east, not from the west. It shows that people in District No. 2 continued to live behind this ring dike, and continued to send their children to the grade school which had no adequate protection from the west except this embankment. It shows they continued to improve their property which was never done by anyone living behind the railway fills with it as their only protection from floods from the west. Thus, it is not possible for this Court to say from any of the evidence that no reliance was placed in this fill by anyone in District No. 2. This is particularly true when these residents knew that no one could remove or destroy a dike under the statutes of the State of Oregon without assuming a duty to substitute equal protection therefor.

In this same paragraph on the top of page 4 this Court says:

“No one contemplated any danger of overflow from the west * * *”

We call the Court's attention to the opinion of Honorable James Alger Fee in the case of Clark v. United States above quoted where he says that the Columbia River is from time to time subject to tremendously high floods, and it was a matter of general knowledge that such floods do overtop and break down protective works and dikes. There is no evidence whatsoever in the pre-trial order or the evidence that would justify such a statement. This statement is taken entirely from the opinion in the District Court which was contradicted by the same court in the Clark case. One or two witnesses testified that they had no reason to anticipate a break of the railway fills. It could well be true that those individuals had no reason to contemplate such a disaster but there is no showing that they had any knowledge upon which to base such statements. In any event, the people in District No. 2 foresaw the possibility when they made their contract with the county to maintain this embankment. It is also shown that other people contemplated it for the reason that no one except the Government building its housing project had been willing to spend money in the development of Peninsula District No. 1, which had no other protection on the west except the railway fills.

The Court in this same paragraph then goes on to say:

“* * * for six years after the underpass was cut and the ring levee constructed, Drainage District No. 2 did nothing to protect itself, notwithstanding it had the continuous duty of maintenance, strengthening and repair of either Denver Avenue or the western embankment. All of this time the district had sovereign power of eminent domain and assessment for such purposes.”

This statement was also taken from the District Court opinion, not from the pre-trial order. We have already pointed out that there was no possible way that District No. 2 could have protected itself. The only way suggested in either Court was to strengthen the railway fills two miles or so to the west or to strengthen Denver Avenue embankment. We don't believe this would be authority for a drainage district to condemn either a railway fill or a public highway nor for the condemnation of the ring dike which had been constructed and was owned by the United States. The physical situation shows that there was no other way of protecting themselves against this underpass. In addition to that, these people in District No. 2 were undoubtedly relying on the protection that the ring dike would give them and were justified in such reliance. As already pointed out the physical appearance of this ring dike was sufficient to convince any layman that it was sufficient. This is particularly true in view of the fact that the statutes of the State of Oregon made it a duty for the Government to afford equal protection when this embankment was destroyed. This all important statute we wish to point out has been completely ignored by the District Court and by this Court. We have pointed it out and quoted

it time after time but so far have not been able to get either the District Court or this Court to acknowledge it. Would this opinion be authority for the proposition that one wrongfully destroying a dike is relieved of obligation if those who were damaged do not protect themselves?

In the third paragraph on page 4 this Court says:

“Without setting forth each assignment of error, suffice it to say the findings of the trial court are fully substantiated by the transcript of the record.”

This it seems to us is merely a summary dismissal of our appeal with an evasion and refusal to recognize the issues and the facts involved and is based upon factual statements which are contradictory, unsupported and a distortion of the “meticulous” statements of facts in the pre-trial order. We respectfully do not believe that any evidence can be found to support any of these findings to which we have objected. They can only be supported by brushing aside the objections without considering them. We have the greatest faith in the Federal Courts and in the integrity of every member of the bench. We have had and still have a very high regard for the Honorable James Alger Fee and appreciate and admire the many exhaustive and instructive decisions that he has made. But in this case which involves practically nothing but facts which the layman can well understand, we can find no way of explaining to them that they have had a fair trial upon the issues presented by them and the facts that were developed in the pre-trial order. We are therefore asking this Court for a rehearing en banc.

11. This Court in the next paragraph of its opinion on page 4 makes this statement:

“An identical factual situation was presented to this court by the inhabitants of Vanport wherein this Court in *Clark v. U. S.* 218 F. 2nd 446 at page 451, said * * *

This statement is not understandable. In the first place these fifty-two cases were segregated from the Vanport cases and tried separately for the very reason that there was no similarity whatsoever in the issues presented. Again we wish to call the Court's attention to the statement made by the Honorable James Alger Fee in that case on page 220 as follows:

“The ground should be cleared first. Denver Avenue fill broke after Vanport was flooded, so no causal connection between that incident and any property damage here complained of can be established.”

Also the statement in the opinion of this Court, page 3:

“District No. 2 was protected by the Denver Avenue fill until the next day, May 31st, when the ring levee constructed at the east of the underpass gave way, and as a result District No. 2 was also flooded.”

The Court then goes on to quote these Vanport cases as holding that the Government had no responsibility over the railway fills and no liability could attach to or rest upon the United States for any damage by flood or flood waters at any place. Perhaps the Court meant by this that since it had already decided that the breaking of the railway fills was the sole cause of the damage in District No. 2 then it became a question of whether the United States Government was liable for the breaking

of those fills. If that question was involved here we could have no fault to find with this ruling. However, we must insist that the railway fills are not involved in this proceeding. We must insist that we are intitled to a hearing on the issues presented which are that District No. 2 had as its western protection the Denver Avenue embankment which was wrongfully destroyed without providing equal or adequate protection. We must insist that Section 702 (c) 33 USCA cannot apply to the destruction of Denver Avenue embankment and the failure of the Government to provide adequate protection. According to the evidence of Mr. Schanck it would not have taken a flood to have broken through the ring levee that was provided by the Government to protect this underpass (R. 167). And since this ring dike was not built by the Government in aid of the diking district and the destruction of Denver Avenue embankment was wrongful and a duty was imposed upon the Government to substitute equal protection therefor, this Section 702(c) cannot apply.

12. In the first full paragraph on page 5 of the opinion this Court quotes from the Honorable James Alger Fee's opinion in the District Court as follows:

"The sole cause of damage to plaintiffs was the failure of the western embankment at District No. 1
* * *"

This we have already pointed out is not supported by the "meticulous" pre-trial order or by any evidence or any pleading or any contention. The only place it could be taken from was the opinion of the Honorable James Alger Fee and it was not supported in any manner. It

was one of the twenty-nine errors in the factual statements of the opinion which have already heretofore been mentioned and it was contradicted by this same Court in the Clark case as above pointed out.

The 500 people involved, we repeat again, cannot understand why they are unable to get a hearing on the issues presented to the Court and why the actual facts are not considered. They can never be appeased by telling them they relied upon the railway fills two miles outside of their district and not within their control, and did not rely on Denver Avenue embankment on which they had a specific contract, when they know it was not the fact. Or can they be appeased by holding that the sole cause of damage was the breaking of the railway fills when they know that is not the fact.

13. In the next paragraph of the opinion of this Court on page 5 this Court says that:

“The evidence unmistakably discloses that the failure of the railroad embankment in District No. 1 was the sole and proximate cause of the flooding of District No. 2, an embankment over which the Government at no time had any control. This eliminates any consideration as to the ring embankment.”

Just how this Court can arrive at such a conclusion is not understandable. There is no evidence whatsoever in the “meticulous” pre-trial order that would justify such a conclusion. The duty imposed upon the Government or anyone else destroying a dike in this manner by the statutes of the State of Oregon to provide substitute and equal protection is completely ignored and is

not mentioned in this opinion at all. Why was this all important statute ignored? How is it possible for this Court to say that because the breaking of this railway fill was the sole cause it eliminates any consideration of the ring embankment when that underpass and ring dike are the only issues in the case?

14. In the last paragraph on page 5 the Court says that it is difficult to rationalize the case of *Indian Towing Co. v. U. S.*, 350 U.S. 61, which was decided after this case was submitted and the citation was presented by counsel for appellants. That case held that where the Government undertakes to maintain lights for the guidance of shipping it owes a duty to maintain such lights and is responsible for damages if it fails to do so. The opinion goes on to say that the ring dike in this case was built for the protection of District No. 1 in the event the levees in District No. 2 should fail. The protection of Drainage District No. 2 was solely the responsibility of said district. The opinion still goes on to say that the inhabitants of District No. 2 had the power and duty to protect themselves and that they cannot now as an afterthought charge the Government. This reference to "afterthought" is also taken from the opinion of the District Court and not from the "meticulous" pre-trial order which showed that this district had provided for and relied upon the Denver Avenue embankment at all times since 1917. The Court also ignores the fact that the rights of District No. 1 and District No. 2 were identical. There was no more reason for protecting District No. 1 than for protecting District No. 2. In fact, not as much. This Court in making this statement

ignores the statutes of the State of Oregon which very definitely imposes the duty of one removing a dike or a portion thereof to substitute equal protection. It is a duty, in the opinion of counsel for appellants, that would be imposed on anyone for removing a dike even without this statute. But with the statute expressly imposing that duty, we cannot understand the Court's ignoring it.

This statute provides as repeated many times, that when an owner of a parcel of property in a district over whose lands a dike has been built, desires to move the location of that dike and destroy it, then he can do so by filing a petition with the Court and getting approval of the Court but is duty bound to substitute another dike of equal protection to the satisfaction of the engineer for the district. In this case the Government took no such action. It simply destroyed the dike by cutting this underpass with no authority from anyone having the right to grant it. Can it be possible that this Court is holding that if one filed such a petition and followed the statute he would have the duty imposed upon him to substitute equal protection, but if he does the act wrongfully without any authority from any source, then there is no such duty imposed? Can it be possible that this opinion can be cited as authority to this effect?

The opinion in the same paragraph then goes on to say:

“Apparently appellants feel the government owed a duty to maintain the ring embankment for the protection of the inhabitants of District No. 2.”

Most certainly we so feel. Could such a duty be imposed upon the Government any more clearly and certainly

than by the statute already referred to but which this Court has ignored?

At this point we wish to refer to the case of *United States vs. Ure*, reported in *Federal Reporter*, 2nd Series, Vol. 225, page 709. This is an opinion reversing the District Court. At the argument in this case when this was called to the writer's attention, he was very much embarrassed by not having caught it although it was reported in the last advance sheets prior to the argument. We find this opinion is helpful and not harmful to our cause. This opinion holds that the tort claims act may be invoked on a negligent or wrongful act or omission. Then the Court recites that this irrigation ditch was inspected twice daily by the government employees and there was no evidence of negligence. The damage resulted in failure in the first instance to line the ditch with concrete in one certain spot. The Court holds as we understand it, that full consideration had been given to this in the first instance together with consideration of the money available for the purpose and it was determined that it was unnecessary to line the ditch with concrete at that particular place. The Court recites that it had held up for 11 years and considers that the failure to line this ditch with concrete was a matter of discretion and not wrongful for which the government was not responsible.

We are fully in accord with this decision. It is obvious, as the Court said in its opinion, that the Court looked to the record and not to the opinion or findings of the District Court in making this decision. Now if we can induce the Court to look to the record in this case, which consists of a meticulously drawn pre-trial

order to which there can be no dispute and a very small amount of oral testimony in which there was little or no dispute, then it will feel that the actions of the government's agents in this case were both wrongful and negligent. If the Court will review this record, it will find that District No. 2 relied upon this Denver Avenue embankment as its western protection at all times since 1917 (R. 22, 26, 446, 251, 344, 347); it will find the District had an express agreement for the mutual protection and benefit of the County, the Highway Commission and the two Districts under which this embankment was looked upon and used as a dike (R. 28); it will find that the Government agents had notice of this express agreement and that it took its land expressly subjected to this easement (R. 472); it will find that the dike was destroyed by the construction of the underpass and that the easement for District No. 2 was likewise destroyed with no authority whatsoever (R. 48); it will find that this underpass was desired for convenience only and that it was not necessary (R. 48); it will find that the government's agents were willing to destroy the protection to District No. 2 for their own personal convenience and to subject the lives and property of the residents, their families, their children congregated in the grade school and all of their investments to the great hazard which was followed by the great tragedy of 1948 and the complete flooding and terrific destruction of the appellants' property (R. 53); it will find that the government's agents appropriated this same embankment for the protection of its own dollar investment in District No. 1 with no consideration whatsoever for the

protection of District No. 2 (R. 53); it will find that the government's own witness, Mr. Turnbull, testified that the destruction of this dike was unsound whether it be considered as a primary or a secondary protection (R. 244); it will find that the government's own engineer, Mr. Dibblee, in filing his flood and completion report, stated that Denver Avenue embankment was a dividing levee (R. 446) and recommended that this underpass be eliminated (R. 454).

As we see it, under these circumstances, no Court could find that this was the exercise of proper discretionary power or could find that it was anything but a wrongful act.

Now as we go further and can induce this Court to recognize the so far ignored statutes of the State of Oregon, it will find that when this dike was so destroyed by the underpass, the government was expressly subjected to the duty of providing equal protection for the residents of District No. 2, (ORS 551.140 - OCLA 123-126). In the case of *Indian Towing Co. vs. United States*, 350 U.S. 61, the U. S. Supreme Court held that when the government is subjected to a duty, it is negligent in not fulfilling that duty and becomes liable under the tort claims act. Going further, the Court will find that when the government took the property on the east side of Denver Avenue for the purpose of building its ring dike, the property was subjected to the easement of District No. 2 for the use of this embankment (R. 471-472). It follows that when the government took this property, it became bound with the duty to respect and recognize that easement and not to destroy it. So that

under the Indian Towing Co. case above quoted, it would be negligence on the part of the government to destroy this easement; of course it would also be wrongful; the Court will also find that two of the government's agents, employees of PHA, secured the assistance of a government engineer and recommended that the ring dike be built up to standard so that it would give protection to both Districts but they were only scolded for their interference by FPHA (R. 349-363 and R. 191-194). Under all of these circumstances, there can be no question but that the government was guilty of a wrongful act in destroying the embankment and destroying the easement and that it was guilty of negligence in not fulfilling its duty in providing equal protection for both districts and in its failure to recognize and protect the easement to which its land had been expressly subjected.

Now we ask the Court in all humility, in view of the fact that all of the legal principles involved in this proceeding are favorable to the appellants and in view of the fact that all their assignments of error were directed to the 29 contradictory, unsupported and erroneous findings of the District Court; can these appellants possibly have a fair hearing by the process of eliminating all of these assignments of error by the adoption of the 29 contradictory, unsupported and erroneous findings of the District Court and the ignoring of the all important statutes of the State of Oregon?

15. The opinion in this case is then wound up by the statement that:

“* * * the ring embankment was built by contractors and the underpass was also built by con-

tractors under the sole supervision, jurisdiction and control of the Oregon State Highway Commission, consequently, if Drainage District No. 2 had any claim for damages such claims should have been pressed against the contractors and the Oregon State Highway Commission."

The facts as disclosed by the "meticulous" pre-trial order are that the FPFA, a government agent, was given permission by the State Highway Commission to cut an underpass through private property over which it had no control, destroying the easement which District No. 2 had on Denver Avenue embankment and which was recognized by the Government in condemning the property upon which the ring dike was built subject to this easement. The same record shows that the underpass was constructed by FPFA and not by the State Highway Commission.

Thus it seems this Court approves the appellee's contention that the Highway Commission should be liable in this case because it constructed the underpass which was not the fact. The Highway Commission takes the position that it did not construct the underpass, it was a private way. It could not be done without the Highway Commission's consent. But under the statute it was up to the appellee to also procure the consent of the Court and District No. 2 and to substitute a ring dike with equal protection. These factual statements are true. A fine example of "passing the buck".

The Government had notice of the rights of District No. 2. The contract was in the deed to the county which had been duly recorded twice. The Government took

its land expressly subjected to this easement. Besides, the physical appearance could not help but put them on notice that this embankment was being used as a dike. (See Appendix A App. Br.).

THE PREDICAMENT OF THE APPELLANTS

Counsel for appellants wish to again express their confidence in the courts and the integrity of the judges and we still have full confidence that this Court will grant to the appellants a hearing upon the issues involved and will apply the facts as presented in the record to those issues. We feel that if that is done there can be no other finding than that the appellants were entitled to recover. But even if they are not entitled to recover, the 500 or so people involved will feel that at least the Court has considered their contentions and the issues involved and have recognized the true facts. Then they may be able to understand the decision.

However, their loss has been great. Their homes and property were destroyed. They had an all important specific contract for the protection of Denver Avenue embankment which has been emasculated and ignored by the Court. They have had faith in the Government's protection but this faith was destroyed when the Government refused and failed to recognize the duty imposed upon it by the all important statute to provide equal protection when the embankment was destroyed. Mortgage companies refuse to make loans in this area since 1948 for fear of floods and improvements for the most part are now more or less at a standstill. The fu-

ture for this district is bleak. A substitute dike for Denver Avenue embankment is both a physical and economical impossibility. There is no confidence in the Government being required to perform the duty imposed upon it by the Oregon statute. Their express contract to use Denver Avenue embankment has been emasculated and ignored. Would another contract suffer the same fate? This case would seem to be authority for the Highway Commission to grant a permit to similarly destroy the dike along the Columbia River over which the Highway Commission maintains a highway. It does seem to be authority for the proposition that anyone can destroy any of their dikes at any point and the duty to protect against it is transferred to and falls upon the district, not the wrongdoer.

The airport located in Multnomah District No. 1 to the east is currently contemplating the spending of several hundred thousand dollars for the construction of a cross dike for its protection which would answer the same purpose as Denver Avenue embankment afforded Peninsula District No. 2. If that is done will this case be authority for someone to destroy it with an underpass with immunity because he has no reason to anticipate the breaking of the outside dikes? And will the duty to protect against any such underpass fall upon the district and not the wrongdoer?

We have spoken of the agreement being emasculated. Perhaps we should elucidate.

The District Court in quoting the contract with the County substituted asterisks for the meat upon which

the appellants rely. By this interpretation the contract is left perfectly harmless and meaningless so far as the appellants' contentions and rights are concerned. Obviously the best contract ever written could be emasculated in the same manner and perhaps made to say exactly the opposite of what it is intended to say. We refer the Court to Item 8, page 73 to 76 of appellants' brief for a further discussion.

As a matter of fact the Plan of Reclamation for Peninsula District No. 2 was emasculated by the District Court in the same manner. By quoting sentences here and there taken from the entire instrument it is construed to mean just the opposite of what was intended and was clearly provided. We refer the Court to Item 1, pages 37 to 49 for a more complete discussion.

Then the District Court emasculated appellants' entire case by finding that the breaking of the Railway fill, two miles to the west, was the cause of the flooding of District No. 2 and eliminating all consideration of the facts set out in the pre-trial order and adopting factual findings completely contradictory thereto and not supported thereby.

The Honorable James Alger Fee wrote his second opinion in the Vanport cases, *Clark v. U. S.*, 13 FRD 342 where the Court said:

"When a plaintiff has by his counsel advised the Court and defendant of the theories upon which he relies and has given account of these, then the Court should not adopt some other theory of recovery, even if it should be believed that such a theory was more applicable. The other side has also a right to rely upon the theory stated by the

counsel for the plaintiff, and it is entire (in)justice to require the defendant to accept some theory of law propounded by the Court for the first time in the opinion. Likewise, the defense in these cases very carefully sets up theories of defense. Here also the same considerations prevail. The defendant should be bound by such theories as well as the plaintiff, and the Court should not find some other ground on which to deflect the attack. If it should be believed either by the trial judge or the appellate judges that the theories are incorrect and do not fit the facts, then the case should be remanded for the purpose of drafting a new pre-trial order and these things should then be set forth. In this instance, it is believed that the pre-trial order covers very exactly both the theory of recovery and the theories of defense."

This opinion written by the Honorable Judge Fee we consider to be very well written, very educational and very instructive. We assume that it means what it seems to mean. That is, when the plaintiff sets forth his issues and theories of the case he is entitled to a hearing upon those issues and the Court should not adopt some other theory, either for the plaintiff or for the defendant. In the instant case the Court has adopted its theory entirely different from either the plaintiff's or defendant's and created a defense for the defendant that was never thought of by the defendant itself and which is not available to it. Certainly it is not taken from any of the pleadings, any of the contentions, or any of the evidence. If the Court can adopt some other theory of the case than is presented by the plaintiffs or defendants and can dismiss the case without trying out the issues presented, then these words, as it appears to us, become meaningless.

SUMMARY

Now summing up the issues in this case and the evidence, it becomes extremely simple. The Denver Avenue embankment was built over a strip of ground 317.6 feet in width. Eigthy feet, or approximately one-fourth of this belonged to the county and the balance of approximately three-fourths belonged to the land-owners. The eighty feet was conveyed to the county for the consideration for their agreement to build this embankment. It is obvious from the instrument and from the circumstances that this embankment was to be built across swamp and overflowed land for a bridge approach and that the surrounding lands were to be reclaimed by dikes. It was considered between the parties, Peninsula Industrial Company and the County that this embankment would act for a dual purpose. It would provide a bridge approach for the all important interstate highway which would not be destroyed by the annual high water, and at the same time it would protect the land on either side from overflow from either direction. If the landowners could be encouraged to reclaim the land on either side this would lend further protection to the highway fill while the highway fill would be protection to the land on both sides. Therefore, this arrangement was one for mutual protection. The parties in this position drew an instrument, a deed, in which this contract between the two parties was very clearly and expertly set forth. This deed, including this agreement, is an extremely well-drawn document. There is no doubt that both parties expected the other to use

this embankment, the county for the purpose of maintaining a highway over the top, the landowners for the purpose of protecting their property from overflow, a situation that was for their mutual benefit. (Please see map, Appendix A App. Br.).

The title to the middle strip of eighty feet was taken over from the county by the Highway Commission but under no circumstances could it take over more than the county had which was merely a right to maintain the embankment and operate a roadway thereover, subject to the easement of the landowners to use the embankment for their own purposes, which very obviously was for no other reason than to protect their property from floods.

The Government condemned the property adjoining this embankment on the east in the area of the underpass, which was later built, subject to the easement of these landowners in District No. 2 to use this embankment for their protection.

The Government then, through FPHA, cut an underpass through this, having only the permission of the Highway Commission which owned only eighty feet of the 317.6 feet with an easement on the balance to maintain a highway over the top thereof and subject to the easement of the landowners in District No. 2 to use the embankment for their protection. The Highway Commission under these circumstances could have no rights whatsoever to cut such an underpass themselves or to permit it to be done.

The all important statute in the State of Oregon prohibits a landowner of a district over whose ground a dike runs from destroying the dike without permission of the Circuit Court and assuming the duty of substituting other protection of equal value to the satisfaction of the engineer for the district. This all important statute was entirely ignored by the District Court and entirely ignored by this Court. The duty imposed upon the Government to substitute equal protection under the express and clear terms of this statute was entirely ignored in both courts.

The ring dike, when it was built by the Government, was never intended for the purpose of living up to this duty. In fact, it is contended by the defense that no one was authorized to do anything for the protection of District No. 2. According to their contentions and the evidence, it was built for the protection of their own dollar investment in District No. 1 although the rights of District No. 1 and the rights of District No. 2 were identical and stemmed from the same identical instrument. This ring dike concededly was insufficient to give District No. 2 any protection because it had defects that were not apparent to the layman's eye and as a consequence residents of District No. 2 continued with the improving of their property, continued with the operation of their grade school behind this dike, continued to live in their homes undoubtedly depending upon the protection which they assumed was given by this ring dike. The ring dike was shown to be approximately the same size as outside dikes so that to the layman's eye

it afforded equal protection. It was a lure and a trap only for the residents of District No. 2.

These are the facts as set out by this "meticulous" pre-trial order. These are the facts upon which the entire issues and the right of the plaintiffs to recover depend. The case cannot properly be determined without the acknowledgment and the consideration of these issues and these facts, neither of which are disputable.

We realize this case has become quite complicated and confused. Counsel have undoubtedly failed in properly presenting it. However, we feel very strongly that regardless of our failure these appellants are entitled to a hearing on the issues attempted to be presented for them and on the true facts as set out in the pre-trial order. We respectfully urge the reconsideration of this case by the Court.

Respectfully submitted,

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Portland 4, Oregon;

DONALD C. WALKER,
911 Portland Trust Building,
Portland 4, Oregon,

Attorneys for Appellants.

No. 14596

**United States
Court of Appeals**
for the Ninth Circuit

JERRY LEE REESE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Northern Division.**

FILED

FEB 15 1955

PAUL P. O'BRIEN,

CLERK



No. 14596

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorney for the Appellant.

In the District Court of the United States for the
Northern District of California, Northern
Division

Cr. 11195

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JERRY LEE REESE,

Defendant.

INDICTMENT

Violation: Section 12(a), Universal Military Training
and Service Act, 50 U.S.C. App. 462(a).

The Grand Jury Charges:

That Jerry Lee Reese, the defendant herein, being a male citizen of the age of 24 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948," as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act," hereinafter called "said Act," and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, became a registrant of Local Board No. 11 of the Selective Service System in the City of Oroville, County of Butte, State of California, which

said Local Board No. 11 was duly created, appointed and acting for the area of which the said defendant is a registrant, did, on or about the 26th day of February, 1954, in the City of Oroville, County of Butte, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-O, did then and there knowingly refused and fail to comply with the order of his said Local Board No. 11 to report to his said Local Board No. 11 to be given instructions to proceed to a place of employment designated by said Local Board No. 11 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest as provided in the said Act and the rules and regulations made pursuant thereto.

A True Bill.

/s/ FRITZ KAMINSKY,
Foreman.

LLOYD H. BURKE,
United States Attorney;

By /s/ JAMES S. EDDY,
Assistant U. S. Attorney.

Bail, \$1,000.00.

/s/ OLIVER J. CARTER.

[Endorsed]: Filed July 12, 1954.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT
OF ACQUITTAL

May It Please the Court:

Now comes the defendant and moves the court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The denial of the ministerial classification is illegal, arbitrary and capricious because the draft boards employed artificial standards in determining what constitutes a minister of religion within the meaning of the Act and Regulations; and they did not follow the definition of the term used in the Act and Regulations in determining the claim of the defendant as a minister of religion.

4. The denial of the ministerial classification by the draft boards was arbitrary and capricious in that they held that the performance of secular work by the defendant, alone, without determining whether it was his avocation and used his performance of secular work to defeat illegally his ministerial status because the undisputed evidence showed that he is not engaged in secular work as a main business but only incidentally to his main

work of the ministry, and that, according to the Act and Regulations he is regularly and customarily engaged in teaching and preaching the doctrines and principles of a recognized church and pursues such preaching work as his vocation and does not preach incidentally to the performance of any secular work; and, therefore, the draft board order is illegal, contrary to law and without basis in fact.

5. The denial of the claim for exemption as a minister of religion by all of the draft boards, and each of them, is without basis in fact, arbitrary, capricious and contrary to law.

6. The order of the local board for defendant to perform civilian work at the Los Angeles County Department of Charities and sections 1660.1 and 1660.20 of the Selective Service regulations are in conflict with the Act, because the work is not national or federal work as required by the Universal Military Training and Service Act.

7. The Act, as construed and applied by the regulations and the order, calls for a private non-federal labor draft for the performance of services that are not exceptional or related to the National defense, in violation of the Thirteenth Amendment to the United States Constitution.

8. The Act, as construed and applied by the regulation and order, is unconstitutional because it deprives the defendant of due process of law contrary to the Fifth Amendment to the Constitution.

9. Section 462 (a) of the Act, Part 1660 of the regulation insofar as they have been construed and applied to the defendant are an unreasonable abridgment of his right of property contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

10. Sections 1660.20 (d) and 1660.30 of Part 1660 of the Regulations are contrary to the First, Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

11. The draft board lost jurisdiction to order appellant to report for induction because he was denied procedural due process of law in that the Department of Justice illegally deprived him of his right to an investigation, hearing, report and recommendation upon his claim for classification as a conscientious objector, contrary to Section 1626.25 of the Selective Service Regulations and Section 6 (j) of the act.

12. The local board upon personal appearance deprived appellant of a full and fair hearing when it denied appellant the right to discuss further his claim for classification as a minister after he said that he was educated in a manner different from the orthodox clergy, which was in violation of his rights guaranteed by the regulations, the act, and the Fifth Amendment.

13. Defendant was denied procedural due process in that the local board failed to have available an Adviser to Registrants and to have posted conspicuously, or any place, the names and addresses

of such advisers, as required by the Regulations, and to the defendant's prejudice.

14. The local board abused its discretion by arbitrarily refusing to reopen appellant's classification on two occasions, namely, November 4, 1953, and February 23, 1954, when he presented evidence, which, if true, required reclassification and in failing, on each occasion to forward the file to the Appeal Board after its refusal to reopen the classification.

15. The local board upon personal appearance deprived appellant of a full and fair hearing when it limited appellant to 5 minutes to discuss further his claim for classification as a minister, which was in violation of his rights guaranteed by the regulations, the act, and the Fifth Amendment.

Respectfully submitted,

/s/ J. B. TIETZ.

[In pencil following signature.] 16. Reese not given opportunity to submit jobs which he would do. (SS 152 see.)

[Endorsed]: Filed September 8, 1954.

[Title of District Court and Cause.]

MINUTE ORDER—OCTOBER 4, 1954

This case came on regularly this day for ruling, on Motion for Judgment of Acquittal and on Merits of the Case tried before this Court sitting without a jury on 8th day of September, 1954.

Defendant present in pro per having previously waived presence of J. B. Tietz, Esq., his attorney. James S. Eddy, Esq., AUSA, present on behalf of the U. S.

It Is Ordered that the Motion for Judgment of Acquittal be, and the same is, hereby Denied, and that the defendant be, and is, adjudged Guilty as charged in the Indictment.

It Is Further Ordered that the defendant be allowed to remain on bail heretofore posted, and that the matter of pronouncement of Judgment and Sentence be, and the same is, hereby continued to the 12th day of October, 1954, at the hour of 9:30 a.m. before Oliver J. Carter, District Judge in San Francisco, California.

United States District Court for the Northern
District of California, Northern Division

No. 11195

UNITED STATES OF AMERICA,

vs.

JERRY LEE REESE

JUDGMENT AND COMMITMENT

On this 12th day of October, 1954, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of violation of Section 12(a),

Universal Military Training and Service Act, 50 U.S.C. App. 462(a).

(Defendant Jerry Lee Reese did, on or about February 26, 1954, at Oroville, California, knowingly refuse and fail to comply with the order of Local Board No. 11 of the Selective Service System at Oroville, California, to report to said Local Board No. 11 to be given instructions to proceed to a place of employment designated by said Local Board No. 11 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest),

as charged in the indictment (single count); and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year and One (1) Day.

Ordered that the defendant be granted a stay of execution of judgment for period of twenty-four (24) hours.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and

that the copy serve as the commitment of the defendant.

/s/ OLIVER J. CARTER,

United States District Judge.

The Court recommends commitment to an institution to be designated by the U. S. Attorney General.

[Endorsed]: Filed October 19, 1954.

Entered October 20, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Jerry Lee Reese, resides at Florin, California. Appellant's Attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 So. Spring Street, Los Angeles 12, California.

The offense was failing to proceed to a place of employment designated by his local board, contrary to U. M. T. & S. Act, Title 50 App., Sec. 462 (a).

On October 12th, 1954, after a verdict of Guilty the Court sentenced the appellant to confinement in an institution to be selected by the Attorney General for one year and one day.

I, J. B. Tietz, appellant's attorney, being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,

Attorney for Appellant.

[Endorsed]: Filed October 12, 1954.

[Title of District Court and Cause.]

EXTENSION OF TIME

For good cause shown, defendant is hereby given 60 additional days, to and including January 21, 1955, to prepare and docket the record on appeal.

Dated: November 8, 1954.

/s/ OLIVER J. CARTER,
Judge.

[Endorsed]: Filed November 8, 1954.

In the United States District Court in and for the
Northern District of California, Northern
Division

No. 11195

UNITED STATES,

Plaintiff,

vs.

JERRY LEE REESE,

Respondent.

TESTIMONY OF WITNESSES

September 8th, 1954

DORIS J. PROUTY

called to the witness stand, having first been duly and regularly sworn by Mr. Cyr to testify the truth, the whole truth, and nothing but the truth in the matter of her testimony, testifies as follows:

Mr. Cyr: Will you spell the last name?

Mrs. Prouty: P-r-o-u-t-y.

Mr. Cyr: Doris J. Will you take the witness stand?

(Testimony of Doris J. Prouty.)

By Mr. Eddy:

Q. You have given us your name, Mrs. Prouty. What is your address, please?

A. Route 5, Box 1045, Oroville.

Q. And are you the Clerk of Local Board 11 of the Selective Service System? A. Yes.

Q. And as such Clerk, are you the custodian of the records of that Board? A. Yes.

Q. Have you brought certain records with you today? A. Yes.

Q. What records are they?

A. It is the complete file and cover sheet for the defendant, Jerry Lee Reese.

Q. And is Jerry Lee Reese a registrant with Local Board 11? A. Yes. [1*]

Q. Do you know him? A. Yes.

Q. Is he present in Court? A. Yes.

Q. Is he sitting over there with his Attorney?

A. Yes.

Q. Were these—was this file kept regularly in the regular course of business of Local Board 11?

A. Yes.

Q. May I see it, please? A. Yes.

Mr. Eddy: May it please the Court, we have photostated this file, but the trial date was—they are still being developed, and I intend to offer this in evidence, and ask the Court's leave that when the photostated copy is ready, it may be substituted for the original copy.

(Testimony of Doris J. Prouty.)

Judge Carter: Do you have any objection to that, Mr. Tietz?

Mr. Tietz: No objection.

Judge Carter: All right, then, the original will be taken in evidence as defendant's Exhibit Number One. The whole file?

Mr. Eddy: The whole file.

Judge Carter: Well, when the photostatic copies have been prepared, they may be substituted in lieu of the original. [2] Now the whole file is in evidence, and you may refer to such part as you wish to.

Mr. Eddy: Very well, your Honor. May I ask the clerk if—what classification this registrant bears with the Local Board 11 at this time?

A. (By Mrs. Prouty): 1-O classification.

Q. And does the file reveal when he was so classified? A. Yes.

Q. Will you give me that date, please?

A. January tenth, 1952.

Q. And was he notified of this classification?

A. Yes.

Q. When was he so notified?

A. January fourteenth, 1952.

Q. Did he take—does the file reveal if he took any appeal from this classification?

A. No, he did not.

Q. Does the file reveal if he was ordered to report to Local Board 11 to do work of national importance on or about the fifteenth day of February, 1954? A. Yes, it does.

(Testimony of Doris J. Prouty.)

Q. What is there in the file that would indicate that?

A. There is the SS form 153, the order to report for civilian work, and statement. [3]

Q. Was that mailed to him? A. Yes.

Q. Who mailed it?

A. Local Board—I did.

Q. Did you mail it? A. Yes.

Judge Carter: What was that sent?

A. September fifteenth, 1954.

Q. (By Mr. Eddy): And does the file contain that communication from him in response to this order to report for work of national importance?

A. Yes. On February twenty-sixth, 1954, we received his letter acknowledging the receipt of the order, and his statement that he couldn't accept the job.

Q. Did he give you reasons?

A. Yes. He says, "I cannot conscientiously accept any job that will interfere with my God-given duties." Do you want me to read the whole letter?

Q. No. Does he—when was this letter received?

A. February twenty-sixth, 1954.

Q. And was this before or after the day on which he was supposed to report?

A. This was after, as he was ordered to report on the twenty-fifth day of February.

Q. You received this on the following day? [4]

A. Yes.

Q. This was received, then, eleven days after

(Testimony of Doris J. Prouty.)

the order was mailed to him, and one day after he was supposed to report, is that right?

A. Yes.

Q. Does he make any other claim in this letter?

A. Yes.

Q. What does he claim?

A. He says, "I was appointed to a more important position in my church. This appointment is to the position of Assistant Congregational Servant. This position increases my field of ministry, the time spent and the people served. In addition to this new position, I still have the duties outlined to you in a previous letter."

Q. Is this the first time he notified the board that he had been appointed to that particular position in the church? A. Yes.

Q. Now, did the Board respond to that portion of his letter received on the twenty-sixth of February?

A. Not to that portion, because he had already been ordered.

Q. Well, did you not write him a letter?

A. Yes—oh, yes, we acknowledged receipt of his letter, and wrote to him. [5]

Q. Yes. Well, will you find that letter and read it to the Court?

A. "This is to acknowledge receipt of your letter which was received this date. The local board is without authority to reopen your classification, since you were ordered to report for civilian work in lieu of induction. The SSS form 1953, Order to

(Testimony of Doris J. Prouty.)

Report for Civilian Work, was mailed February fifteen, 1954, reporting date was February twenty-five, 1954. Since you failed to report, your complete file is being forwarded to California State Headquarters for Selective Service, according to Selective Service Regulations 1660.30. Very truly yours, Local Board 11."

Q. Now, in addition to his letter received February twenty-sixth, had this registrant at any time made a request for reopening of his classification?

A. Yes.

Q. And when was that?

Mr. Tietz: February thirty.

Q. (By Mr. Eddy): It was in July of 1953?

A. (By Mrs. Prouty): Yes.

Judge Carter: It would be subsequent to that time, wouldn't it?

Mr. Eddy: No, this was in 1954.

Judge Carter: On this February twenty-sixth, it was '54?

Mr. Eddy: Yes, your Honor. [6]

A. (By Mrs. Prouty): Yes, this one is October 22, 1953, he wrote requesting a consideration.

Q. (By Mr. Eddy): What grounds did he urge upon the Board at that time?

A. He states that he cannot accept the work, and "I hold a position that is termed as Area Study Conductor. My duties in connection with this position entail teaching an educational class of forty persons every Wednesday from 7:30 to 8:30 p.m. This is a Bible study, and the public is invited. Also

(Testimony of Doris J. Prouty.)

on Saturday and Sunday at 9:30 a.m. I have charge of this same group and direct it in our preaching activity from house to house for two hours each of these mornings. At this time I also train newly interested persons in proper methods of preaching the good news of God's kingdom to individuals at their homes. In addition to this, on Monday evenings at 6:45 I aid several members of the group, if it is not under my direction, in starting home Bible studies with people they have contacted in their house to house preaching activities."

Q. What was his classification at that time?

A. He was 1-O.

Q. Did he ever make a request for a deferment on the basis he was an apprentice?

A. Yes, he did.

Q. When did he make that?

A. This was received October 27th, 1952, by the local board.

Q. And what action was taken on that [7] request?

Judge Carter: What was the request on October twenty-seventh?

Q. (By Mr. Eddy): What was that request?

A. It was a request for a deferment to be an apprentice bricklayer.

Q. And what action was taken on that request?

A. A Board meeting was held, and—on July the ninth, 1953, and this form he mailed in was considered, and was not acted upon by the Board; but it was considered.

(Testimony of Doris J. Prouty.)

Q. What action was taken with respect to his request for a reopening in 1953? Because he was an Area Bible teacher?

A. Yes. A Board meeting was held, and at the Board meeting his complete file was reviewed, and new evidence was considered, and the Board retained him in the 1-O classification.

Q. In the 1-O classification? A. Yes.

Mr. Eddy: No further questions.

Mr. Tietz: No cross-examination.

Mr. Eddy: You may step down.

Judge Carter: Will you step down, please, Mrs. Prouty?

(Thereupon the witness leaves the stand.)

Mr. Eddy: No further evidence, your Honor. The Government rests.

Judge Carter: Mr. Tietz, you will stipulate that the [8] defendant refused to report for the work that he was ordered to do in SS form 1953 on February fourteen, 1954?

Mr. Tietz: Yes, sir.

Judge Carter: There is no—would be no point on that at all—that is, there will be no contest of that fact?

Mr. Tietz: Not on that fact, no.

Judge Carter: All right. The Government rests. Now, do you wish to have your motion for judgment put on trial now?

Mr. Tietz: Yes, sir, and I would like, unless the Court wishes otherwise, to argue that point now.

Judge Carter: All right. The motion will be filed on that point. Well, on those grounds, you may argue, Mr. Tietz.

(Thereupon ensued an argument by Mr. Tietz upon the motion, after which the Court was recessed from 11:58 a.m. to 1:30 p.m.)

Mr. Tietz: The defendant would like to call Colonel Henderson as our witness.

WALTER H. HENDERSON

called to the witness stand, having first been duly and regularly sworn by Mr. Cyr, to testify the truth, the whole truth, and nothing but the truth in the matter of his testimony, testifies as follows:

Q. (By Mr. Cyr): Your first name, [9]
Colonel?

A. Walter H. Henderson.

Mr. Cyr: Take the witness stand.

By Mr. Tietz:

Q. Colonel, would you please state your rank and your occupation?

A. Lieutenant Colonel Walter H. Henderson, Civilian Manpower Division, State Headquarters, Selective Service, California.

Q. Your duties require you to have a certain degree of familiarity with the Selective Service regulations? A. They do.

Q. And at all times concerned in this particular case—that is, the years 1951, 1952 and 1953, there

(Testimony of Walter H. Henderson.)

was a regulation in effect, Number 1604.41, that required local boards to have one or more advisers to registrants, and to have the names and addresses of those advisers posted in a conspicuous place in the Board office?

A. There was a section of regulations in effect during that period which provided for the appointment of advisers to registrants. I don't recall the number of it.

Judge Carter: Are you talking about the Code of Federal Regulations?

A. 1604.41.

Mr. Eddy: May it please the Court, I think the Code of Federal Regulations speaks for itself.

Judge Carter: I don't know whether it does or not. [10]

Mr. Tietz: Well, I thought it would be helpful if we would establish that that particular regulation has not been at any time suspended. Isn't it a fact, Colonel, that the——

Judge Carter: If there is an objection, I will entertain it.

Mr. Eddy: I will object to the opinion of this witness as to the law.

Judge Carter: Well, if he wants to know if there has been any change in it, and wants to know how long it has been in effect, you may go into that; but as to the law itself, that is a question for the Court; but as to whether it was in effect and——

Mr. Tietz: Would you answer the question, Colonel?

(Testimony of Walter H. Henderson.)

A. (By Colonel Henderson): Would you state the question again?

Mr. Eddy: Would you like to see a copy of that regulation?

Judge Carter: You wanted to know how long that regulation was in effect, is that the point?

Mr. Tietz: I want to establish by this witness that this particular regulation has never added a comma in the version that was in effect in '51, '52 and '53, and that any version available to the Court—the Court generally has the 1949 version—would be useful to the Court.

Judge Carter: Well, has there been any change in [11] those years?

A. (By Colonel Henderson): None that I can recall.

Q. (By Mr. Tietz): Do your duties involve an inspection or some degree of supervision of Local Board Number 11, California?

A. Not directly.

Q. Are you familiar with their operations?

A. No, I can't say that I am.

Q. Can you tell us of your own knowledge whether or not this Local Board has ever had an advisor to registrants as designated in 1604.41?

A. Yes, there are two advisors to registrants appointed to that Local Board.

Q. Under Section 1604-41?

A. So I understand from the personnel records of the State Headquarters, yes.

(Testimony of Walter H. Henderson.)

Q. Well, were these advisors for this Local Board in 1951, '52 and '53?

A. As I recall, their appointments were made in 1950.

Q. Do you know if they were serving in 1951, '52 and '53?

A. Well, I can only judge on the record, and according to that, their appointments were still in effect during those years, yes.

Mr. Tietz: That's all. [12]

Judge Carter: Any further questions?

Mr. Eddy: No further questions.

Mr. Tietz: Thank you, very much, Colonel. The defendant will call the clerk of the Local Board, Miss Prouty.

Mr. Cyr: Let the record show this witness here heretofore been sworn, and her name is Doris J. Prouty. Will you take the witness stand?

DORIS J. PROUTY

resumes the witness stand.

By Mr. Tietz:

Q. Miss Prouty, will you give us the name or names of the advisors to registrants of your Local Board?

A. (By Mrs. Prouty): Albert King.

Q. Would you spell that, please?

Judge Carter: Former Assemblyman Albert King. He is an attorney-at-law in Oroville. He used to be the Assemblyman in that district; although I don't know if it is Albert H.

(Testimony of Doris J. Prouty.)

A. (By Mrs. Prouty): Albert H., I think it is. K-i-n-g.

Mr. Tietz: I have been dumbfounded by the fact that there have been advisors to any Local Board in California.

Judge Carter: That is the same Albert King I am speaking of?

A. (By Mrs. Prouty): Yes, he is a very popular attorney.

Q. (By Mr. Tietz): Was he the advisor in 1951, '52 and [13] '53?

A. So far as I knew, yes. Since I have been there, anyway.

Q. Do you have a bulletin board in your local board office?

A. I wouldn't exactly call it a bulletin board, but we do have forms posted on the board.

Q. You have a place where you post the requests of—changes in classification, and listing registrants, and such? A. Yes.

Q. Is that the only place where you post information to the public? A. Yes.

Q. Have you during all of 1951, '52, '53 had the name and address of Albert King posted there?

A. No.

Q. Has it ever been posted, to your knowledge?

A. Not to my knowledge, no.

Q. It isn't posted now? A. No.

Q. It wasn't posted in '52 or '53? A. No.

Mr. Tietz: That's all.

Judge Carter: Any questions, Mr. Eddy?

(Testimony of Doris J. Prouty.)

Mr. Eddy: Mrs. Prouty, have you ever assisted registrants [14] in the preparation of their forms and questionnaires?

Mr. Tietz: I will object. That is immaterial.

Judge Carter: Will you repeat the question?

Mr. Eddy: Certainly. I am asking this clerk if she has ever assisted registrants in the preparation of their forms and questionnaires.

Judge Carter: I will sustain the objection. That is immaterial.

Mr. Eddy: Your Honor, if this witness were permitted to answer the question, I believe I can show that the function which was intended to be performed by these advisors to registrants were performed by this clerk and by members of the board.

Judge Carter: Well, of course, that, I don't think, is the answer to the regulation if the regulation applies in the manner in which it should. Perhaps I should, out of an overabundance of caution, permit the testimony to be taken, and then grant your motion to strike it, and then if I am not around, you can take it up, Mr. Eddy; so I will, subject to a motion to strike, permit you to take the testimony, and if I am not around, there will be something in the error to be corrected.

Mr. Eddy: Will you answer the question, please?

Judge Carter: He wants to know if you assisted applicants—registrants. [15]

A. (By Mrs. Prouty): Yes, I do.

(Testimony of Doris J. Prouty.)

Q. Do you know if members of Local Board Number 11 have assisted registrants similarly?

Mr. Tietz: Same objection.

Judge Carter: Same ruling.

A. (By Mrs. Prouty): To my knowledge, they haven't helped any registrants fill out any forms. I always help them in the local board.

Q. (By Mr. Eddy): Have you advised any registrants as to their rights and liabilities under the Selective Service law? A. Yes.

Q. Do you know who?

Mr. Tietz: Continue the objection.

Judge Carter: Yes, it will be to the full amount.

Q. (By Mr. Eddy): Do you know if any members of the board have similarly advised registrants as to the liabilities and rights under the Selective Service law?

A. Since I have been clerk, I don't believe the local board members or the appealing have done any advising on their own. I have had several telephone calls from the same, many for the regulations, and giving the information that a registrant has taken to them.

Q. Were members of the board available to registrants for that service? [16] A. Yes.

Q. Did you—speaking now particularly of this defendant, did you advise him as to his rights or liabilities under the Selective Service law?

A. I can't recall that he ever asked for any information like that. We have talked to him. I

(Testimony of Doris J. Prouty.)

imagine it was information he wanted when he was in the office.

Q. Would you have advised him, had he asked you? A. Yes.

Q. And you have dealt with him face to face, have you, in the line of work? A. Yes.

Mr. Eddy: No further questions.

Mr. Tietz: I renew my objection.

(Thereupon ensued a discussion between Counsel and Judge Carter.)

Q. (By Mr. Tietz): You have heard Mr. Eddy say you have been always ready, willing, and I suppose he meant able to advise on Selective Service matters?

A. (By Mrs. Prouty): Yes.

Q. Have you ever advertised that fact to these young men? Have you posted anything or in any way let them know that you were there to help them?

A. I certainly have. I have spent hours talking to some registrants and advising them of their rights, and I [17] am very happy to explain it all to them.

Mr. Tietz: I move to strike that as non-responsive. I meant you advertised so that everyone will know.

Judge Carter: I understand what you mean, and I don't think she understood your questions in the way it was put.

Mr. Eddy: The fact she would be present in the

(Testimony of Doris J. Prouty.)

room with other registrants, or advising one, would be advertising to others, and I believe it is responsive.

Judge Carter: No, I don't think it is responsive to the question as put by Mr. Tietz. What Mr. Tietz wants to know, Mrs. Prouty, is there any notice given to the registrant that the clerk, board, or any official would be available to advise them? Is there any type of notice given to them so that they know to whom to go?

A. (By Mrs. Prouty): At the time they register, we do talk to them, and I make it a point to advise them of all their rights, so that they may come in and add anything to their file. I do go over that thoroughly with them, so that they understand just what—that this local board is always their local board, and any information on any classifications always comes from that particular local board, because they are always moving around, and I certainly do.

Q. Do you tell them at any other time except when they register?

A. Unless them come in. [18]

Q. Unless they ask. Now, this young man registered before you became a clerk of the local board, didn't he?

A. Yes.

Q. Do you recall you ever told him that any time he wanted to know anything about Selective Service procedures, you would help him?

A. No, not this particular registrant.

Q. Now, when you sent out C-140's telling him

(Testimony of Doris J. Prouty.)

the evidence he gave was in the opinion of the board insufficient for the board to reopen the case, did you advise him that might be considered by some judge, an appeal board order, and, therefore, he should appeal from that C-140?

Mr. Eddy: I will object to that, your Honor, I can't understand it myself.

Judge Carter: Yes, the question is rather difficult.

Mr. Tietz: I might say that a District Judge said to me once that is an appeal board. I said, "There is no such thing. The only thing you appeal is a classification." Now, that C-140, as the witness knows, is—I will read it.

Judge Carter: Well, I don't know what a C-140 is. The witness may know.

Mr. Tietz: I think I better read it.

Q. Mrs. Prouty, you have a form that is used by your local board called C-140? A. Yes. [19]

Q. And it is a mimeographed form, and reads as follows: (Thereupon Mr. Tietz reads the form.) Now, on November the 4th, 1953, was page twenty-six of the exhibit and on pages twenty-three and fifty-four, which is page fourteen of the exhibit, you sent out on those C-140's, did you not?

A. Yes.

Q. Did you tell him he ought to appeal from that C-140?

A. How could he appeal from a C-140? His classification wasn't reopened or changed.

Mr. Eddy: I object to the question, your Honor.

(Testimony of Doris J. Prouty.)

I believe Counsel has already argued that there is no appeal from that.

Mr. Tietz: I have argued, but I have always set that limit Judge Hanks set, it is up to the registrant to appeal everything.

Judge Carter: Well, I am not going to get in an argument with you or Judge Hanks on the matter.

Q. (By Mr. Tietz): Did you——

A. (By Mrs. Prouty): He could have appealed when he got his 110. That is the notice that says you may appeal.

Q. But you didn't send any 110 out November, 1953, or February, 1954?

A. No, his classification was not changed. [20]

Mr. Eddy: May it please the Court, I will stipulate that Counsel wishes—I don't know which side he is on—that there is no appeal from that C-140.

(Thereupon ensued a discussion between Court and Counsel.)

Q. (By Mr. Tietz): Then are we to understand that at no time did you ever give this registrant any advice?

Judge Carter: That you recollect.

A. (By Mrs. Prouty): I believe when he was in a local board and had an unofficial personal appearance, he came in to determine the type of work he would do. We were there, and advised him of all the jobs that were available, and also referred him to State Headquarters, and I believe he went to the State Headquarters and talked to someone

(Testimony of Doris J. Prouty.)

there about it; and that was advice that was given to him.

Q. (By Mr. Tietz): Did you advise him that at such particular time that he had the right to suggest certain jobs that he would be willing to do?

A. Yes, he could suggest the kind he wanted.

Q. You told him he could suggest some?

A. Well, we asked him what type of work he would like to do that was available.

Q. Oh. From the list that you gave him, is that right? A. Yes. [21]

Q. You didn't tell him he could submit a list of his own, irrespective of any list you showed him?

A. I certainly didn't.

Mr. Tietz: I wish to add a ground—a sixteenth ground, your Honor, and that is—I will state it now while it is fresh in my mind, that the regulations contemplate what might be termed a type of bargaining—that is, that the board invites the registrant to submit a list of his own, and if that list is not acceptable, then the board submits a list, and if neither list produces a mutually satisfactory result, that an arbitrator, usually from State Headquarters, comes down—I say arbitrator, that is my own language, but that is exactly what it means—sits down with the parties and tries in an amicable way to get them to agree, and as I understand this witness' testimony, they didn't comply.

A. (By Mrs. Prouty): Yes, we did have representatives from State Headquarters in the office

(Testimony of Doris J. Prouty.)

at the time the registrant was in, and showed him the jobs. That was the idea of it.

Q. You showed him the jobs you had for him, is that right?

A. Well, he didn't submit any that he wanted to do.

Q. Did you tell him he had the right to submit jobs that he chose?

A. Does he have the right to submit—— [22]
Mr. Tietz: Oh!

Judge Carter: Well, the question was, did you tell Mr. Reese he had a right to submit the jobs he would do?

A. (By Mrs. Prouty): I believe he has—there is a form in here which we sent him and asked him the jobs that he would do. There is one in here.

Judge Carter: In other words, you think he was sent a written——

A. Yes, there is a form in here, a volunteer for work, and we sent it to them, and they fill out the kind of work they would like to do.

Judge Carter: No reply was sent you, is that correct?

A. Yes.

Q. (By Mr. Tietz): What page was that?

A. It is this SS Form 152. The first type he has bricklaying and stone masonry. His orders are preference of work.

Judge Carter: Any further questions, Mr. Tietz?

Q. (By Mr. Tietz): Were his preferences considered at any board meeting, to your knowledge?

(Testimony of Doris J. Prouty.)

A. (By Mrs. Prouty): Let's see—he submitted this in August, 1952. That was before I was the clerk.

Judge Carter: Well, but was it ever considered——

A. (By Mrs. Prouty): The time we were trying to find work for him? [23]

Judge Carter: Yes.

Mr. Tietz: My question is, do you know or can you point to something in your official records that show that they were considered?

A. I can't point to anything that shows they are considered, but they are always considered.

Mr. Tietz: I object to that as a conclusion.

Judge Carter: Well, is that the custom and practice?

A. Yes, certainly, but I don't know of any bricklaying and stone masonry that are available at the present time. There might have been then. We try, and always, yes. That is the reason why we have him come up and try to agree on the job. We are happy to let them pick out what they want to do.

Q. (By Mr. Tietz): Now, Mrs. Prouty, I want to ask you what preparations you have made to advise these registrants.

A. Advise them of what?

Judge Carter: Their rights under the regulations. He wants to know what preparation is made, either by way of courses of study, or——

A. Oh. I have studied the regulations of the job. Every day I study the directives that come

(Testimony of Doris J. Prouty.)

from State Headquarters, and any other directives from National Headquarters, and any time I am not sure of the regulations—one that happens to come up—why, I contact State Headquarters.

Q. (By Mr. Tietz): Do you recall reading this Regulation [24] 1604.41?

A. No, I don't recall reading it.

Q. Do you have any recollection that there was supposed to be a notice posted so that the world could see that there were some people—not necessarily the board, employees of the board like yourself who would advise registrants?

Mr. Eddy: I will object to this question, your Honor. I don't think it has any materiality. He has established the fact that advisors were appointed, but that no notice was posted. Now, what this witness knows about this regulation, I can see no materiality to it.

Q. (By Mr. Tietz): Do you know, was there ever anything ever posted letting the world know that there was an appeal or advisors available?

A. Every registrant is classified when he is eighteen and a half.

Judge Carter: When you say classified——

A. He gets his first classification, 1-A, or whatever it is, and on the 110 is the Notice of Appeal, and that, they may contact their government appeal agents on it.

Q. (By Mr. Tietz): Is there anything about advisors to the registrant?

A. I don't know if it is used in that word, "ad-

(Testimony of Doris J. Prouty.)

visors.' They may contact the government appeal agent. [25]

Q. The government appeal agent and the advisor to the registrant are entirely different functionaries, aren't they?

A. I don't know whether they are or not. I thought they were the same thing.

Mr. Tietz: That's all. Should I invite the Court's attention to the specific section, so that there won't be any question?

Judge Carter: Well, you can call the Court's attention on argument.

Mr. Tietz: That's all.

Mr. Eddy: No further cross.

(Thereupon the witness leaves the stand.)

JERRY LEE REESE

called to the witness stand, having first been duly and regularly sworn by Mr. Cyr, testifies as follows:

Mr. Cyr: Your name is Jerry Lee Reese

A. Yes.

Mr. Cyr: Will you take the witness stand?

By Mr. Tietz:

Q. You are the defendant in this case, are you not? A. Yes.

Q. Have you had an appearance before your local board on December 5th, 1951, did you [26] not? A. Yes.

Q. Have you had occasion to look at the sum-

(Testimony of Jerry Lee Reese.)

mary placed in the file, page 77 of the exhibit of this hearing? A. Yes.

Q. Is it substantially correct? A. Yes.

Q. The part that says that Mr. Grass, who is the chairman, informed registrant that they would give him five minutes to present his case, that is exactly what took place, is it? A. Yes.

Q. At this hearing did you come prepared to make any sort of presentation to the local board?

A. Yes, I did.

Q. On what subjects did you come prepared?

A. I was prepared to explain about our ministry work and minister school, how we learn to become speakers and better ministers. I had fifteen minutes prepared.

Q. Did you come prepared to discuss and argue with him on the matter of classification?

A. Well, not to argue. I did want to get my classification changed.

Q. Were you hindered in any way from making the presentation that you had intended to give?

A. Well, before I ever said anything, they said I [27] only had five minutes, and so I tried.

Q. Any other way you were hindered from making your presentation?

A. Well, I hadn't talked very long, and they asked me some questions.

Q. Do you mean the questions and the manner of asking them hindered you?

A. Yes, they changed the subject.

(Testimony of Jerry Lee Reese.)

Q. If you had more time, if you hadn't been cut off, what would you have explained to the board with respect to your ministry?

A. Well, I wanted to make clear to them why Jehovah's Witnesses are organized, how it would be preaching work from door to door, calling on everyone. We use three to eight minute sermons, reading scriptures from the Bible, how we place literature with the people and call back on those people, and I start Bible studies with those that are interested, and I wanted to explain the matter of our work so they would understand just what we do.

Q. Did you get to explain the details of your work? A. No, I didn't.

Q. What would you have explained with respect to, say, studies?

A. Well, when we place literature with the people, we usually go back and try to encourage Bible study, and [28] for these studies I have prepared the lesson—that is, what we are going to study.

Q. When you say Bible study, what do you mean, just reading?

A. No, we have books that discuss various subjects, and that we have a systematic study of the Bible.

Q. Are there any other periods, then, that are termed studies, in your work?

A. Well, yes, we have studies there in Kingdom Halls, too.

Q. Do you attend those studies? A. Yes.

(Testimony of Jerry Lee Reese.)

Q. Or rather, did you during 1951, 1952, up to the present attend those studies?

A. Yes, I did.

Judge Carter: As a student, or as a teacher?

A. Well, as a teacher, mostly.

Judge Carter: That is, you directed the class?

A. Yes, I directed one of the classes every week.

Judge Carter: Well, I am talking about this one particular Kingdom Hall.

A. Yes, I direct the class at Kingdom Hall.

Judge Carter: And is that the one you referred to when you answered the question?

A. Well, we have four different meetings at [29] the Kingdom Hall, and I am director of one.

Mr. Tietz: How long is that meeting, in time?

A. One hour.

Q. It is regular each week?

A. Yes, every week.

Q. Does it require preparation? A. Yes.

Q. How much preparation, in terms of minutes, hours, does it take?

A. Well, I usually spend an hour to an hour and a half studying my lesson.

Q. Now, you speak of other studies at Kingdom Hall. Are they regular studies? A. Yes.

Q. Do you regularly attend them?

A. Yes.

Q. How much time do they take?

A. Each one is one hour.

(Testimony of Jerry Lee Reese.)

Q. Do they require any preparation on your part?

A. Yes, they do require preparation.

Q. How much time?

A. About an hour for each lesson.

Q. Now, during this period of your Selective Service processing, did you do any publishing?

A. Yes, I did. [30]

Q. Did you get to explain to the local board at this meeting what publishing is?

A. I did not.

Q. If you had the chance to explain, what would you have told them?

A. Well, I would have explained what we mean when we say 'publishing.' That means actively preaching to people in their own congregation—that is, at the people's doors, and preaching later with them, and so forth.

Q. Now, at the time how many hours a week of publishing were you engaged in?

A. About five hours a week.

Q. Now, in addition to that five hours a week, you spend how many hours a week in other religious work?

A. Well, about five hours a week studying, and then four hours a week attending meetings.

Q. Now, are there any other things that you had planned to explain to the local board that you didn't get a chance to explain at the hearing?

A. Well, as I mentioned before, I wanted to explain about our ministry school.

(Testimony of Jerry Lee Reese.)

Q. What is that?

A. That is work there in the house, where we read from the Bible and various members of the congregation give eight minute talks to the congregation on the chapter under [31] consideration. That way we learn, too, by the speakers.

Q. Now, in 1951, in December, what was your title, if any, with your local company or congregation, as it is called?

A. I was a congregation publisher.

Q. Did you at a later time have any different titles and ones that carried with them increased work?

A. Yes.

Q. Will you tell us about that?

A. In April of 1952, I was appointed as an Area Study Conductor, where I directed the study at the Kingdom Hall each week, and in February of 1954, I was appointed as Assistant Congregation Minister, and I had the duties of keeping all the records, all of the various activities the members of our congregation engage in. I keep all the records.

Q. Do you hold that title now?

A. Yes, I do.

Q. Is your time since——

Judge Carter: Just a moment. You say that is Assistant what?

A. (By Mr. Reese): Congregation Minister.

Q. (By Mr. Tietz): What relation does that have to the company servant? Would you be, technically, then, the company servant? [32]

A. Yes, assistant.

(Testimony of Jerry Lee Reese.)

Q. The word 'company' was used generally up until about two years ago, and then the word 'congregation' came into more general use, is that right? A. Yes. It means the same thing.

Q. Now, when you refer to the congregation, with respect to being Assistant Congregation Servant, you mean what congregation?

A. Sacramento South Congregation.

Q. That is a congregation of what? Laymen or ministers? A. Ministers.

Q. In other words, you are a band of ministers?

A. Yes.

Q. Do you have any other band of laymen?

A. We do not.

Q. Don't you have some territory?

A. Yes, we do have the people we preach to in their homes.

Q. Do you have a territory? A. Yes, I do.

Q. Is that territory exclusively yours to do that ministry work in? A. Yes.

Q. Do you regularly minister to the people in that [33] area? A. Yes.

Q. In what way?

A. We try to see that each home is called at least twice each six months.

Q. And what does 'back once' mean?

A. Well, 'back once' is where we go back where you place an article of literature.

Q. You mean it is a second personal call, is that it? A. Yes.

A. And what do 'home studies' mean?

(Testimony of Jerry Lee Reese.)

A. That is Bible study in the home.

Q. Of the laymen in your geographic area—your parish? A. Yes.

Q. So that you do have two congregations, that of your own band of ministers, and that of your geographic area? A. That's right.

Q. And I say you. I mean you, personally.

A. Yes, I had a personal territory.

Q. How many ministers are in your congregation of ministers? A. Ninety-three.

Q. When that congregation gets to be over a hundred, it splits up in two, doesn't it?

A. Well, when it gets up about a hundred and seventy-five, [34] it is divided.

Judge Carter: Mr. Reese, the terminology used by the Jehovah's Witnesses, are they persons on whom you call who are not members of the sect, with whom you do this ministry work, or to whom you carry a message, are they in that terminology called congregation?

A. Yes, that would be a congregation.

Judge Carter: Under the terminology used by Jehovah's Witnesses? A. Yes.

Q. (By Mr. Tietz): Is there a scriptural basis for that conception?

A. Yes. Christ Jesus set the example, and all his apostles followed that example.

Mr. Tietz: That's all.

(Testimony of Jerry Lee Reese.)

Cross-Examination

By Mr. Eddy.

Q. Mr. Reese, what is your secular occupation, please? A. I am a bricklayer.

Q. And you are working full time, are you not?

A. Not now.

Q. Were you working full time in February of this year? A. Yes, I was.

Q. And why are you not working full time now?

A. Well, beginning with this month, my wife and I have [35] entered into full time ministry work.

Q. Beginning this month, September?

A. Yes.

Q. Did you work all of last month?

A. Most of it.

Q. Now, you say there are ninety-three ministers in the congregation? A. Yes.

Q. And each has his own territory?

A. Well, some are children. They are learning to be ministers.

Q. Some are children; but of the adults, does each have his own territory? A. Yes.

Q. And he preaches from the doorstep pulpit in his own territory, is that right? A. Yes.

Q. Who is the Congregational Servant or presiding minister of your congregation?

A. Raymond Brungardt.

Q. Do you know the names of the other Assistant Congregational Servants in that congregation?

(Testimony of Jerry Lee Reese.)

A. Well, I am the only one.

Q. Who was the Assistant before you?

A. I became the Assistant when our congregation was divided. [36]

Q. And what congregation were you in before that time?

A. We were the South Unit. It was divided to make the South Unit into Fruitridge Congregation.

Q. Who was the Assistant in the South Unit before it was divided? A. Mr. Uffelman.

Q. Now, on the day you were supposed to report for work, it was the twenty-fifth day of February, was it not? A. Yes.

Q. Now, you did not report for work, did you?

A. No, but I did mail a letter, and I intended for the letter to get there on the twenty-fifth.

Q. But it got there on the twenty-sixth, as a matter of fact?

A. Well, it should have got there on the twenty-fifth.

Judge Carter: You mailed it on the twenty-third, or twenty-fourth?

A. Probably the twenty-fourth. I wrote it on the twenty-third, and mailed it next day.

Q. (By Mr. Eddy): Until that letter was received by the board, you had made no request to reopen your classification on the basis that you were an Assistant Congregational Servant, had you?

A. No.

Q. What was the date this South was split from Fruitridge? [37]

(Testimony of Jerry Lee Reese.)

A. I received the appointment on February the tenth.

Q. Is that the date that the split took place?

A. Well, we operated as one congregation until the first of March.

Q. Oh, you operated as one congregation until the first of March, and it wasn't until the first of March that you assumed your duties as the Assistant Servant for South, is that right?

A. Well, I started taking over the duties and learning what they were as soon as I received the appointment.

Q. But the actual split did not take place until the first of March, is that right?

A. That's right.

Q. How many adults were there in the South congregation before the splitting took place?

A. Before?

Q. Before.

A. I would say there were a hundred and fifty.

Q. A hundred and fifty adults? A. Yes.

Q. And how many adults are there in the South congregation now?

A. I would say in the neighborhood of seventy.

Q. Do you know if you were given this position as [38] Assistant Company Servant because of your draft status? A. I was not.

Q. You were placed in a 1-O classification by the appeal board, were you not? A. Yes.

Q. And you were sent a formal notice of that classification, were you not? A. Yes.

(Testimony of Jerry Lee Reese.)

Q. And you then became aware of your new classification? A. Yes.

Q. You didn't appeal from that classification, did you? A. No.

Q. Why did you not?

A. Well, at that time I thought they would allow me to continue with my preaching activities and stay home.

Q. You were satisfied with it at that time, is that right?

A. Well, I wasn't entirely satisfied, no.

Q. But you didn't appeal?

A. No, I didn't.

Q. You were aware of your right to appeal at that time, were you not? A. Yes. [39]

Q. Prior to the time of your personal appearance before the board, you prepared in writing—I should say in typewriting—five pages of explanation of your position, did you not?

A. Yes, five and a half.

Q. And is this—it is page seventy-nine, your Honor.

Mr. Tietz: Mr. Eddy, is that dated October twenty-second, '53?

A. (By Mr. Reese): December tenth.

Mr. Eddy: '51.

Mr. Tietz: What date?

Mr. Eddy: It was received December ten, '51?

A. (By Mr. Reese): That was submitted at the personal appearance.

(Testimony of Jerry Lee Reese.)

Q. (By Mr. Eddy): Did you give this to the board at your personal appearance? A. Yes.

Q. You prepared this language, did you not?

A. Yes, I did.

Q. And you presented it with that, did you not?

A. Yes.

Q. And in your presentation of this document, you considered what you wanted to present to the board, did you not? A. Yes. [40]

Q. And you included that in your written presentation, did you not? A. Yes.

Q. And you gave this to the board?

A. Yes.

Q. Would it be fair to say that this written argument was a fair likeness of what you intended to convey to the board at that time? A. Yes.

Q. And you included there, I believe, and I read, beginning on forty-three, "I enrolled in the Theocratic Ministry School, wherein they present sermons from the various Bible subjects for presentation to the congregation." That is a reference to the Theocratic Ministry School? A. Yes.

Q. Wouldn't it be fair to say that your written explanation contained all of the presentation which you wished to present to the board? A. No.

Q. Did you think of something that you wanted to tell the board between the time that you wrote this and the time you appeared?

A. Well, I had a short talk, you might say, to

(Testimony of Jerry Lee Reese.)

give to the board, and explain fully our [41] ministry.

Q. Were there any particular substantial points that you wanted to present about yourself that are not in this document?

A. I don't believe I mentioned in there that I give hour sermons.

Q. Will you look at the third paragraph? You mention presenting sermons, in the third paragraph.

A. But those mentioned here aren't the hour sermons.

Q. It doesn't say 'hour'? A. No.

Q. It just says 'sermons'?

A. See, I prepare our sermons, which are public talks given to the public rather than to the congregation especially.

Q. Is that the only thing?

A. Well, I believe there were other points that I had not presented.

Q. I believe you told on your—you testified on your direct examination that you wanted to tell them about the Theocratic Ministry School, but I see that is in your written presentation.

Judge Carter: Would you answer audibly? Is that a question?

Q. (By Mr. Eddy): Is there anything in particular, other than this hour sermon, that you believe you have [42] omitted?

A. Well, that was three years ago. I don't recall everything, but I did have additional information to present.

(Testimony of Jerry Lee Reese.)

Judge Carter: Mr. Reese, was that information information about your personal activities, or was it general information about activities of the Jehovah's Witnesses?

A. Well, it was about myself, and then the general nature of the work; it would be general too.

Q. (By Judge Carter): Now, you were aware at the time that this draft board had heard similar discussions by other members of your own company? A. No.

Q. Well, maybe I shouldn't say 'your own company,' but they had had the problem of considering Jehovah's Witnesses' requests before, had they not?

A. No doubt.

Q. Had you ever appeared with any other young men who were subject to the Selective Service laws at the time they made their presentation to the board? A. No, I haven't.

Q. You haven't had that experience before?

A. No.

Q. So that your discussion was to relate your personal dealings with your religious activities, rather than to [43] make a general discussion of the nature of your —of Jehovah's Witnesses?

A. Yes, primarily it was a personal discussion to all my relationship.

Q. I just wanted to be sure, because I am quite sure the draft board has heard the general character of the work of Jehovah's Witnesses a number of times before.

(Testimony of Jerry Lee Reese.)

Q. (By Mr. Eddy): What was your status in the chapter at that time?

A. Congregation Publisher.

Q. What were your duties there?

A. Well, I was—I gave, as I mentioned, hour talks to the public, I have short sermons in our meetings to the congregation to incite all the brothers to more Christian activities, and of course we are laid upon by Christ Jesus to present the good news of the kingdom, so I did engage in that work. I was also conducting a Bible studies at that time to individuals.

Judge Carter: I think you also explained you went from door to door in publishing?

A. Yes.

Q. And you had a certain area to cover and you attempted to cover that at least twice a year?

A. Yes, all Jehovah's Witnesses have that to do, but being an Assistant Minister and Publisher gives more work. [44]

Q. You were the Congregation Publisher?

A. Yes. At that time I had no special title.

Q. (By Mr. Eddy): You had no special title?

A. I was not an Assistant Congregation Minister, or anything of that type.

Q. You didn't assume those duties until March first of this year?

Judge Carter: He said February tenth.

Mr. Eddy: He received the appointment on February tenth, but the church of which he was to be the Servant was not in existence until March.

(Testimony of Jerry Lee Reese.)

Q. Now referring to the personal appearance again, is it not true that you had ample time in five minutes to explain to the board your personal problems in addition to what you had presented in writing?

A. Well, I had more than five minutes talking prepared.

Q. But to tell the board about your personal relationship to the church in addition to what you had written, five minutes was ample time, was it not?

A. But I wasn't given five minutes to do that, because they questioned me during the five minutes.

Q. How much time did they devote to questioning you?

A. Oh, approximately two minutes, perhaps.

Mr. Eddy: No further questions. [45]

Redirect Examination

Mr. Tietz: A point or two I would like to clear up.

Q. Every member of the congregation is a publisher, is he not? A. Yes.

Q. How many Servants are there, normally, in a congregation? A. Eight.

Q. You were not a Servant in December, 1951?

A. No.

Q. When did you first become a Servant?

A. I believe it was April tenth, 1952.

Q. And then you advised the local board and they sent this C-140 saying they wouldn't reopen?

(Testimony of Jerry Lee Reese.)

A. Yes.

Mr. Tietz: That's all.

Recross-Examination

By Mr. Eddy:

Q. Well, what are the duties of these Servants? When you say eight, does that include the Congregational Servant? A. Yes, it does.

Q. Are there seven others? A. Yes.

Q. Can you tell me what those titles are?

A. There is an Assistant Congregational Servant, the [46] Bible Study Servant, the Territory Servant, Advertising Servant, Account Servant and Watchtower Study Conductor, and the Area Bible Study Conductor.

Q. Do the ministers have regular meetings where they congregate together and worship?

Judge Carter: I think you are—when you are talking about the ministers——

Mr. Eddy: I am talking about the ninety-three members now.

A. (By Mr. Reese): Yes.

Q. Where do they hold those meetings?

A. In the Kingdom Hall.

Q. How often do they hold those meetings?

A. Three meetings a week.

Q. Who presides at those meetings?

A. Well, at the theocratic ministry, it is presided over—I forgot a Servant, there is a Theocratic Ministry School Servant, too. He gives counsel on the way to preach, talks, and to help the brothers become better speakers.

(Testimony of Jerry Lee Reese.)

Q. Is that one of the meetings of the week?

A. Yes, that is one of the meetings of the week.

Q. And the Theocratic Servant presides over those meetings, is that right? A. Yes.

Q. What day of the week is that held? [47]

A. Friday evening.

Q. All right. What other meetings do you have?

A. Immediately following that—the theological meeting starts at seven-thirty. At eight-thirty we have the Servants' meeting. That is presided over by the Congregational Servant.

Q. What other meetings?

A. On Sunday we have the Watchtower Study and the public talks. All the public talks are advertising by talebearing.

Q. And who presides over the Watchtower meetings? A. The Congregational Servant.

Q. And how about the Bible talks?

A. Well, various brothers are used to announce the speaker, and of course the speakers are usually from our own congregations.

Q. Are those the four meetings, now, that you have mentioned—the two on——

A. Then there is the area studies on Wednesday.

Q. On Wednesday? A. Yes.

Q. Where is that held?

A. They are five, in our congregation. One is at the Kingdom Hall, and four are in various homes, and I preside over the one at the Kingdom Hall. [48]

(Testimony of Jerry Lee Reese.)

Q. Is that a meeting of the entire congregation?

A. Well, all our members are assigned to the different congregations.

Q. I mean, that is five different meetings?

A. Yes.

Q. They are small study groups?

A. That's right. Personal study groups.

Q. So that really isn't a general meeting, is it?

A. Well, everyone meets on that night, but in different places.

Q. Now, if a Congregational Servant is not present at the service meeting, who presides?

A. I do.

Q. And if you are not present, who presides?

A. The Bible Study Servant.

Q. If he is not present, who presides?

A. Whoever the Congregational Servant would be.

Q. But there are three of you who have a definite order of presiding at the service meeting, is that right?

A. Yes.

Q. And in the event that one of the three is not present and the Congregational Servant has not appointed anyone, who would preside?

A. Well, that has never happened.

Q. That has never happened in your experience, is that [49] right?

A. Not to my knowledge.

Q. Well, knowing what you do of the principles of this church, what would happen under those circumstance?

(Testimony of Jerry Lee Reese.)

A. Well, the Theocratic Minister Servant might take the job.

Q. One of the other servants could probably take the job?

A. They would probably get together and decide for someone to conduct the meeting.

Judge Carter: The congregation itself could decide, couldn't they?

A. Well, no, the servants would decide.

Q. (By Mr. Eddy): One of the eight servants would preside? A. Yes.

Mr. Eddy: No further cross-examination.

Mr. Tietz: Nothing further. The defense rests. I will renew my motion, your Honor.

(Thereupon ensued argument by [50] Counsel.)

Reporter's Certificate

This is to certify that I, Lois Femling, a competent shorthand reporter, was present at the time and place the foregoing proceedings were had and taken; that I did report the same in shorthand writing; that I afterward transcribed my said shorthand writing to typewriting; that the foregoing, beginning at the top of page 1, to and including line 20 of page 50 hereof, constitute a full, true, complete and correct transcription of the testimony of witnesses at said hearing.

Dated this 3rd day of December, 1954.

/s/ LOIS FEMLING,

Reporter.

[Endorsed]: Filed December 8, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

Indictment.

Motion for judgment of acquittal.

Minute order of October 4th, 1954.

Judgment and commitment.

Notice of appeal.

Designation of record on appeal.

Order extending time to docket appeal.

One (1) volume Reporter's Transcript.

Plaintiff's exhibit No. 1.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 9th day of December, 1954.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 14596. United States Court of Appeals for the Ninth Circuit. Jerry Lee Reese, Appellant, vs. United States of America, Appellee. Transcript of Record, Appeal From the United States District Court for the Northern District of California, Northern Division.

Filed: December 10, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 14596

JERRY LEE REESE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

The denial of the ministerial classification is illegal, arbitrary and capricious because the draft board employed artificial standards in determining what constitutes a minister of religion within the meaning of the act and regulations: and they did not follow the definition of the term used in the act and regulations in determining the claim of the defendant as a minister of religion.

II.

The denial of the claim for exemption as a minister of religion by all of the draft boards, and each

of them, is without basis in fact, arbitrary, capricious and contrary to law.

III.

The order of the local board for defendant to perform civilian work at the Los Angeles County Department of Charities and sections 1660.1 and 1660.20 of the Selective Service regulations are in conflict with the Act, because the work is not national or federal work as required by the Universal Military Training Service Act.

IV.

The Act, as construed and applied by the regulations and the order, calls for a private nonfederal labor draft for the performance of services that are not exceptional or related to the National defense, in violation of the Thirteenth Amendment to the United States Constitution.

V.

The Act, as construed and applied by the regulation and order, is unconstitutional because it deprives the defendant of due process of law contrary to the Fifth Amendment to the Constitution.

VI.

Section 462 (a) of the Act, Part 1660 of the regulation insofar as they have been construed and applied to the defendant are an unreasonable abridgment of his right of property contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

VII.

Sections 1660.20 (d) and 1660.30 of Part 1660 of the Regulations are contrary to the First, Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

VIII.

The draft board lost jurisdiction to order appellant to report for induction because he was denied procedural due process of law in that the Department of Justice illegally deprived him of his right to an investigation, hearing, report and recommendation upon his claim for classification as a conscientious objector, contrary to Section 1626.25 of the Selective Service Regulations and Section 6 (j) of the act.

IX.

The local board upon personal appearance deprived appellant of a full and fair hearing when it denied appellant the right to discuss further his claim for classification as a minister after he said that he was educated in a manner different from the orthodox clergy, which was in violation of his rights guaranteed by the regulations, the act, and the Fifth Amendment.

X.

Defendant was denied procedural due process in that the local board failed to have available an Adviser to Registrants and to have posted conspicuously, or any place, the names and addresses of such advisers, as required by the Regulations, and to the defendant's prejudice.

XI.

The local board abused its discretion by arbitrarily refusing to reopen appellant's classification on two occasions, namely, November 4, 1953, and February 23, 1954, when he presented evidence, which if true, required reclassification and in failing, on each occasion to forward the file to the Appeal Board after its refusal to reopen the classification.

XII.

The local board upon personal appearance deprived appellant of a full and fair hearing when it limited appellant to 5 minutes to discuss further his claim for classification as a minister, which was in violation of his rights guaranteed by the regulations, the act, and the Fifth Amendment.

/s/ J. B. TIETZ.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 20, 1954.



No. 14596

In the
United States Court of Appeals
For the Ninth Circuit

JERRY LEE REESE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

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FILED

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PAUL P. O'BRIEN,
CLERK

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In the
United States Court of Appeals
For the Ninth Circuit

JERRY LEE REESE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 14596

Appellant's Opening Brief

JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Northern District of California, Northern Division. The appellant was sentenced to custody of the Attorney General for a period of one year and one day. [R 9-11]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R 11]

*R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. [R 3-4] It was alleged that he became a registrant of Local Board No. 11 of the Selective Service System in the City of Oroville, County of Butte, State of California and that having theretofore been duly classified in Class I-O, did then and there knowingly refuse and fail to comply with the order of his said Local Board No. 11 to report to his said Local Board No. 11 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest as provided in the said Act and the rules and regulations made pursuant thereto. [R 4]

Appellant pleaded not guilty, waived jury trial and was tried on September 8th, 1954. [R 12-] A written motion for judgment of acquittal was filed. [R 5-] The motion was denied and the appellant was found guilty on October 4th and sentenced on October 12th. [R 8-9] The motion contains all of the grounds that the appellant relies upon for reversal of the judgment in this case. [R 58-]

THE FACTS

Appellant registered with Local Board No. 11 on August 3, 1949 [Ex 1-2]* He filed his 8-page Classification Questionnaire on July 6, 1949. [Ex 5-] In it he showed he was a minister of religion [Ex 7, Series V, 1(a)]; that he regularly served as a minister; that he had been a minister since September 19, 1942, having been ordained on that date; that he was still studying in the Theocratic Ministry school of The Watch Tower Bible and Tract Society. [Ex 7] He showed his secular work was fulltime, he being an apprentice mason. [Ex 8] He did not sign Servies XIV (conscientious objector declaration) [Ex 11] but after he was classified I-A on August 7, 1950 he made a written request for the Special Form for Conscientious Objectors on August 27, 1950 explicitly basing his professions of conscientious objections on his ministry. [Ex 16] He filed the completed Special Form [Ex 19-] and the local board reclassified him into Class IV-E on September 18, 1950. At that time (and until the fall of 1951) IV-E was the class for conscientious objectors who had religious scruples against any type of participation in military activity. Until the terminology was changed to I-O, by regulation dated 28 September 1951, no duties were attached to Class IV-E registrants and appellant was as free to follow his ministry as if he had been given the IV-D (minister's) classification.

*Ex refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

In the fall of 1951 the local boards were sent the new regulations. On November 16, 1951 appellant's local board reclassified him in Class I-A altho no evidence of any nature, new or otherwise, was placed in his file. [Ex 12]

Appellant promptly asked for a personal appearance and an appeal, under date of November 19, 1951. [Ex 23] In this letter he stated he would submit new evidence. This he did on December 10, 1951 the date of his Appearance Before Local Board. [Ex 24, 27-31, 32-33] He showed he was acting as a minister, and was considered as one by his fellows. He did this by his testimony, by a letter from one of his church leaders and by a certification signed by 30 persons. His claim and evidence for a minister's classification (as well as for a conscientious objector's) was again rejected, apparently because he had not "attended or graduated from a recognized Theological Seminary or Bible Institute" . . . "He only attended High School." [Ex 26, the local board's summary of the hearing]

Thereupon appellant again requested an administrative appeal [Ex 34]. On January 10, 1952 the Appeal Board reclassified him in Class I-O. [Ex 36] The decision being unanimous he had no further appellate recourse. [32 C. F. R. §1627.3]

Thereafter, the local board requested appellant to designate three types of civilian work he would be willing to do as a Class I-O registrant. [Ex 66] He gave stone masonry as his first choice, the secular work of

his church's non-profit corporation as his second choice and truck driving as his third choice [Ex 67]. He was offered none of these [Ex 70] and on November 5, 1952 withdrew his offer for the stated reason that he had concluded any of such work would interfere with his ministry. [Ex 75]

On February 21, 1953 the board offered him 3 types of work. [Ex 76] He replied, reminding them he had on file an apprentice training deferment claim [Ex 73] not yet determined. The board replied in such a manner that appellant was deprived of an opportunity to have an administrative appeal. [Ex 79]

After more negotiations between the board and appellant he again pointed out that his vocation was the ministry and that he could not compromise it.[Ex 97]

On October 22, 1953 he presented new and further evidence of his ministry, namely that he had been elevated to the position of Area Study Conductor. This included instruction of a class of 40 persons. [Ex 102-13]. He gave other details of his work, and in corroboration of his personal evidence submitted an affidavit of the presiding minister of the congregation of ministers to which he belonged. [Ex 104] This new evidence was rejected in a manner that precluded appellant from seeking an administrative review of the local board's determination. [Ex 108] Part of the board's error was noted by a selective service supervisory officer [Ex 122] and the clerk thereafter sent appellant a notification which informed him of the rejection of his evidence but the notification did not inform him or

give him, the opportunity for an appellate determination. [Ex 123]

Subsequently, appellant was sent an Order to Report for Civilian Work. [Ex 109-] He again wrote the board this would be a compromise with his ministry. [Ex 118]

Appellant was sent another Order on February 15, 1954 [Ex 127] and he again wrote the board he could not compromise his ministry ; in this letter he also gave new and further evidence of his ministry, namely, that he now held the position of Assistant Presiding Minister. This evidence was corroborated by the Presiding Minister. [Ex 133] His new evidence was disregarded ; there was no rebutting evidence to it or, in fact, to any of his evidence. After appellant's last submission of evidence the board took the position it was without authority to reopen his classification because of the order to report for civilian work.

QUESTIONS PRESENTED AND HOW RAISED

I.

Concerning appellant's ministry: the undisputed evidence was that appellant, from the very first, claimed he was a minister of the gospel and produced evidence that he regularly acted as one, and that he was regarded as a minister by his associates.

When the local board rejected all his claims (including religious conscientious objection to war) and gave him a I-A classification he appealed administratively; the Appeal Board found him to be truthful and credited all his claims that he was a sincere and complete-type (I-O) religious conscientious objector. It ignored his claim to a minister's classification altho his evidence was undisputed.

The question presented here is whether the denial of his claim for a minister's classification was arbitrary. Also involved here is whether artificial standards [no college or theological seminary] were used for judging his claim.

The questions were raised by motion for judgment of acquittal. [R 5-8] All the following questions were raised in the same manner.

II.

Concerning appellant's constitutional and related attacks on the work order: They are whether or not the Act and/or the regulations comply with the follow-

ing amendments to the constitution: 1st, 5th, 13th and 14th and whether or not the work to which appellant was ordered, the Los Angeles County Department of Charities, is a type of work that is as required by the Act.

III.

Concerning procedural denials of due process:

1. Appellant claimed he did not have a fair hearing before his local board on December 10, 1951 in that the undisputed evidence was that he was limited in time to 5 minutes and was otherwise prevented from fully presenting his case for a minister's classification. [Ex 26; R 35-]
2. Appellant's new and further evidence undisputedly was disregarded, although unrebutted and of a determinative character, and his classification was not reopened. [Ex 102-105]

The questions presented are whether appellant was denied a fair and full hearing on December 10, 1951 and whether he was illegally denied a reopening on October 22, 1953.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and entering a judgment of guilt against him.

SUMMARY OF ARGUMENT

I.

Appellant presented substantial evidence to support his claim that he was both a regular and an ordained minister of a recognized sect, one that did not compensate its ministers; that he was considered a minister by numerous persons; that he regularly gave substantial amounts of time to this work; that it was his vocation and his secular activities were only to support his family.

None of his evidence was rebutted and he was rated truthful. Consequently, he should have received the minister's (IV-D) classification:

Dickinson vs. United States, 74 S. Ct. 152.

The basis used for denying his claim (that he had no college or theological school training) is no longer a legal basis:

Franks vs. United States, 216 F. 2d 266;
Clark vs. United States, 217 F. 2d 511 and other
cases cited in Argument I.

II.

The conscientious objector work program to which appellant was ordered suffers from constitutional and related infirmities:

- A. The work is not national or federal work, as required by the Act. Regardless of whether the national interest is served by work that is done for a local governmental unit, Congress intended, and expressly stated, that the work was to be national.
- B. Only where the services are exceptional or not related to the national defense may labor be drafted without violence to the Thirteenth Amendment. Work for the Los Angeles Department of Charities falls in neither of these classes.
- C. Appellant did not volunteer; he was ordered to do work he did not desire to do. Since the compulsory work is neither national, nor exceptional nor pertaining to defense, appellant has been denied due process of law under the Fifth Amendment.
- D. Appellant was given the I-O conscientious objector classification solely because his evidence convinced the Selective Service System he was sincerely doing religious work: his ministry. His

ministry requires his availability to his calling. The order to work at a foreign place for twenty-four consecutive months is contrary to the religious freedom guarantees of the First Amendment.

III.

Selective service registrants are entitled to fair hearings before their local boards. A hearing that is deliberately limited to five minutes, and of which two minutes is consumed by board members, is unfair when the registrant has an unusually heavy burden of proof and has prepared fifteen minutes of relevant material for presentation.

Selective service registrants, whose status materially changes, are entitled as a matter of right to a reopening of their classification, upon presentation of written evidence showing facts, which, if true, justify a reclassification. Even if the local board is unconvinced, it should so handle the situation [reopen] so that the registrant has an opportunity for an appellate determination.

Appellant was denied due process in both of the above instances.

ARGUMENT

I.

THE DENIAL OF THE MINISTER'S CLASSIFICATION WAS ARBITRARY AND WITHOUT BASIS IN FACT.

The undisputed facts are that appellant was a minister of a recognized religious group; that this was his vocation; that his secular work was only to support himself and wife.

As early as 1949, in his first statement to the Selective Service System, appellant showed that he regularly served as a minister. [Ex 7] In fact, he showed that he had been considered, and had acted, as a minister since 1942. The selective service law does not bar minors from being ministers. See §1622.43, Appendix B. On the contrary, the promulgation of Regulation §1622.43, to govern registrants 18 years and up is an acknowledgment of a well known fact, namely, that many sects encourage youths to assume ministerial work.

Nor does the law require ministers, whether regular or ordained, to be "full-time" ministers. The standard is "vocation." Any other standard is an illegal importation.

Appellant was classified in Class IV-E in 1950. At that time such a conscientious objector classification carried no commitment that interfered with his ministry and was therefore the equivalent of a minister's

classification to him. The law was changed in 1951 and the new conscientious objector classification, I-O, carried a commitment of 24 months at work assigned to the registrant by his local board. Concurrent with the change of the law, the local board reclassified appellant in Class I-A. He promptly presented supportive and corroborative evidence of his ministerial status. This evidence was never rebutted. This evidence showed unmistakably the following: he was acting as a minister, and his superiors in his band of nearly 93 ministers, and his fellow-ministers, considered him a minister [Ex 24, 27-31, 32-33]. A legal reason must be found in the selective service file to support the rejection of his unrebutted evidence. A reason is present and apparent but it is not a legal one. The summary (prepared by the board) of the Appearance Before Local Board of appellant [Ex 26] shows that the board apparently rejected his claim because he had not "attended or graduated from a recognized Theological Seminary or Bible Institute." Neither the Act nor the regulations imposes such a requirement. Many decisions have held that the use of illegal standards invalidates the classification; see

Annett vs. United States, (10 Cir. 6/26/53) 205 F. 2d 689; *United States vs. Blevins*, (9 Cir. 11/26/54) 217 F. 2d 506; *Clark vs. United States*, (9 Cir. 12/3/54) 217 F. 2d 511; *Franks vs. United States*, (9 Cir. 10/4/54) 216 F. 2d 266; *Goetz vs. United States*, (9 Cir. 10/14/54) 216 F. 2d 270; *Hagaman vs. United States*, (3 Cir. 5/13/54) 213 F. 2d 86; *United States vs. Hertzog*, (M.D.

Penn. 6/23/54) 122 F. Supp. 632; *United States vs. Hinkle*, (9 Cir. 9/24/54) 216 F. 2d 8; *Schuman vs. United States*, (9 Cir. 12/21/53) 208 F. 2d 801, and *Taffs vs. United States*, (8 Cir. 12/8/53) 208 F. 2d 329.

A case squarely in point is *United States vs. Kezmes*, W. D. Penn. 125 F. Supp. 300. There, like here, the local board believed their Jehovah witness registrant ineligible for a minister's classification because he had no college or theological school training. [302] On the authority of *Dickinson vs. United States*, 74 S. Ct. 152, Kezmes was found not guilty.

It cannot be said the Selective Service System disbelieved appellant, for it gave him the conscientious objector's classification of I-O. If he lied on one claim he could not be believed on the other; true, his claim could have been rejected on the basis that his status or activity did not meet the standards set up by the law; but it couldn't be rejected on the basis of the educational qualification used by the local board or on the basis of mere suspicion or speculation that his ministerial activity did not meet the standard imposed by the law. The latter clearly are condemned by *Dickinson supra*. There must be some contradiction before there can be a rejection. That is the plain rule of *Dickinson*. The Selective Service System cannot ignore a *prima facie* case.

Although appellant makes his living by secular work, his testimony leaves no doubt that he devoted as much time to his ministry as do many of the clergy of the other 399 sects in the United States and that it

was his vocation in his eyes and in the eyes of his associates. [R 35-55]

II.

THE SELECTIVE SERVICE WORK PROGRAM TO WHICH APPELLANT WAS ORDERED SUFFERS FROM CONSTITUTIONAL AND RELATED INFIRMITIES.

- A. The Order of the Local Board for Defendant to Perform Civilian Work at the Los Angeles County Department of Charities and Sections 1660.1 and 1660.20 of the Selective Service Regulations are in Conflict with the Act, Because the Work is Not National or Federal Work as Required by the Universal Military Training and Service Act.***

Section 1660.1 of the Selective Service Regulations reads as follows:

“1660.1 Definition of Appropriate Civilian Work. (a) The types of employment which may be considered under the provisions of Section 6 (j) of Title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

*Defendant is indebted to the General Counsel of the Jehovah's witnesses for the argument herein set forth in A, B and C.

“(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

“(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of public health or welfare, including educational and scientific activities in support thereof when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

“(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O.”

Section 456 (j) of the Universal Military Training and Service Act (50 U. S. C. App. §456(j). 65 Stat. 83, approved June 19, 1951) provides:

“ . . . (2) if the objector is found to be conscientiously opposed to participation in such non-combatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or

interest as the local board may deem appropriate
 . . . ”

The key word here is “national,” as distinguished from state, city or county.

The word “national” has a very important and definite connotation in federal jurisprudence. A reading of the index to the United States Code Annotated shows page after page with references to laws relating to national organizations and laws. There are “national” parks as distinguished from “state” park, “national” banks as distinguished from “state” banks, “national” and “state” labor, relation boards, “national” and “state” housing administrations. These all show that the word “national” has a distinctive federal meaning. . . . See WORDS and Phrases, Volume 28, at pages 21-25.

The word “national” is defined in Volume 65 of *Corpus Juris Secundum*, at pages 38-39. There it is stated that the word “national” is an adjective, which means “pertaining or relating to a nation as a whole; commonly applied in American law to institutions, laws or affairs of the United States or its government, as opposed to those of the several states.” 65 C. J. S. 38-39.

Bouvier’s Law Dictionary, Baldwin’s Century Edition (Cleveland, Banks-Baldwin Law Publishing Company, 1940), defines “national” thus: “Belonging to, affecting, or pertaining to, a particular nation: as, national domicile, the national government. Often op-

posed to State, and nearly synonymous with Federal; as, in national bank (q.v.), or national banking association.”

Webster's New International Dictionary, Second Edition (G. & C. Merriam Co., 1950), at page 1629, defines “national”. It says: “Of or pertaining to a (or the) nation; common to a (or the) whole nation; . . . Of or pertaining to a politically united people or state (a nation in sense (4)) . . . as, national debt.”

Under “Crimes,” 18 U. S. C. A., Section 709, at page 75, it appears that the use of the word “national” is prohibited for all except the federal government. It is a crime to use the word “national” as part of the business or firm, etc., except as permitted by the laws of the United States. In the 1954 Pocket Parts of 18 U. S. C. A., Section 709, the section is extended to National Housing or Public Housing Administration. The punishment is \$1,000.00 fine, imprisonment for not more than one year, or both. Violation may also be enjoined at suit of the United States Attorney.

The annotation shows that the First National Corporation of Boston, a Massachusetts corporation with brokerage powers, it is not entitled, by reason of the inhibitions of former Section 583 of Title 12, to use the word “national” in its title (See 32 Op. Att’y Gen. 473 (1921). *Byers v. United States*, C. A. Kansas 1949, 175 F. 2d 654, cert. denied 70 S. Ct. 183, 338 U. S. 887, 94 L. Ed. 545, holds that the courts will take judicial notice of the fact that a bank with the word “national”

in its title is one organized pursuant to the laws of the United States.

The word "national" cannot be used as part of the name of any bank unless the bank is chartered under the laws of the United States and courts take judicial notice of such fact. See *Wedding v. First National Bank*, 133 S. W. 2d 931, 280 Ky. 610 (1939); *First National Bank v. First State Bank*, Tex. Com. App. 1927, 291 S. W. 206.

In the case where a registrant is ordered to work for the state or a state hospital, this is not a national or federal institution. It is, on the contrary, a state institution and not "national" or "federal" work. The work does not pertain to the "national" interest or welfare. It relates exclusively to "local" or "state" welfare. The work's not being in the "national" interest consequently is not that which Congress intended or could constitutionally order to be performed by conscientious objectors.

A reasonable interpretation of the statute by the Court is due, indulging all reasonable doubts concerning the meaning of the act in favor of the rights of one indicated thereunder. (*Harrison v. Vose*, 50 U. S. 372, 378.) It has been said that a sensible construction should be placed on an act so as to avoid oppression, absurd consequences or flagrant injustice. It will be presumed that Congress intended to avoid results of such a character. (*United States v. Kirby*, 7 Wall. 482, 486-487; *United States v. American Trucking Ass'n*, 310 U. S. 534.) Where a statute is susceptible of two

constructions by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” (*United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408.) The argument of the Government requires the court to place an unreasonable construction upon the act. Additionally it raises “a succession of constitutional doubts as to such interpretation.” (*Harriman v. Interstate Commerce Comm’n*, 211 U. S. 407, 422.)

If the statute is not interpreted in such a way as to afford the appellant the right to raise this point then grave doubts arise as to the constitutionality of the prescribed forced labor procedure. To avoid such consequences, the interpretation here suggested should be accepted.

The final order to perform the work at the Los Angeles County Department of Charities and Sections 1660.1 and 1660.20 of the Selective Service Regulations, authorizing such order, are in conflict with the statute. They are, therefore, void.

B. The Act, as Construed and Applied by the Regulations and the Order, Calls for a Private Non-Federal Labor Draft for the Performance of Services that are Not Exceptional or Related to the National Defense, in Violation of the Thirteen Amendment to the United States Constitution.

The act, as construed and applied, calls for a labor draft for private or nonfederal purposes. This com-

plaint is entirely outside the field of unlimited authority of Congress to raise and maintain an army or provide for alternative service of a civilian nature. The defendant agrees that an examination of the law on this subject will reveal that the Thirteenth Amendment is no ban on the performance of military service. It also does not prohibit civilian work for the government or work for a federal agency, as in taking over industry by the Government, or work under control of the federal system.

All of the cases where the subject of the performance of civilian work ordered to be done by draft boards has been determined by the courts are not in point here; such do not control here. The cases have been considered under the Thirteenth Amendment as related to work done for the National Director of Selective Service in civilian public service camps—federal agencies. Such camps were not private camps but were federal. (See *United States v. Brooks*, 54 F. Supp. 995 (S. D. N. Y.), affirmed *Brooks v. United States*, 147 F. 2d 134 cert. denied 324 U. S. 878; *Weightman v. United States*, 142 F. 2d 188 (1st Cir.); *Zucher v. Osborne*, 54 F. Supp. 984 (D. C. W. D. N. Y.); *Hopper v. United States*, 142 F. 2d 181 (9th Cir.). None of these cases involved orders placing a conscientious objector in non-federal employ or in the employ of private persons. It is seen that there exists here an obvious distinction between the orders under the present law and the work required under the 1940 Act. This is a real and substantial distinction. It is not one without a difference.

It must be admitted that there is no constitutional right of exemption from any kind of work that is within the discretion of Congress and the President to order a conscientious objector to perform. The appellant does not argue that a conscripted conscientious objector has a greater choice of work to perform than a person conscripted for ordinary military service. He does not. They are both on the same level. Neither may set his choice of service up against the discretion of the President acting under a proper law of Congress. The discretion and power of choice as vested in the President by the scope of the war power given to him through the act of Congress are unlimited. The objection here is that the order to do work for a nonfederal agency is not within the scope of the Universal Military Training and Service Act. If it is argued that it is, then it is the appellant's position that Congress does not have authority to conscript labor for a private employer or for a nonfederal project. In other words, the order in this case to perform civilian work is like a labor draft for private employers. It was not for the performance of service in the war effort of the nation.

The best way to emphasize this point to the court is to make an analogy. It will be conceded that men can be drafted to perform military service, notwithstanding the Thirteenth Amendment. But it seems that a very substantial and different question arises here. The Thirteenth Amendment prohibits the President from taking those men and putting them to work for private industry, even engaging in war work, which is not by

the Federal Government. It must be admitted that a soldier cannot be put to work by the Government in a private defense industry. It follows that conscientious objectors may not be ordered to do work for a private employer not engaged in federal work as an agency of the Government. If a soldier cannot be ordered to do private work for a private employer then a conscientious objector cannot be compelled to do such work. The question is as simple as that! It must not be mixed up with a maze of complex questions of war powers of the President.

There are no cases where the labor draft for private employment has been determined by the federal courts. No federal labor draft has yet been passed by Congress. The action of the President in taking over the railroads and putting them in the hands of the army to prevent strikes is an evident interpretation of the Thirteenth Amendment, that it must be federal employment to give the power. While this is not directly in point it is of persuasive weight that the Government has no unlimited control over the relationship of private employer and employee but it does over its own employees. It is true that there are laws that authorize federal injunctions against strikes in certain national industries engaged in commerce. But that situation is not in point. The right to strike is one thing. Involuntary servitude is another.

The cases involving the civilian public service camps (*United States v. Brooks*, 54 F. Supp. 995 (S. D. N. Y.), affirmed *Brooks v. United States*, 147 F. 2d Cir., cert.

denied 324 U. S. 878; *Weightman v. United States*, 142 F. 2d 188 (1st Cir.); *Hopper v. United States*, 142 F. 2d 181 (9th Cir.); *Zucher v. Osborne*, 54 F. Supp. 984) should be put aside in one broad sweep. It is obvious that such cases did not involve a drafting for a private labor for nonfederal agencies.

The civilian public service camps were operated at the expense of the Government. They were under the control of General Hershey and subject to the Selective Service Regulations promulgated by the President. It could not be successfully argued that the Thirteenth Amendment reached labor in such camps. It was alternate conscription service of a civilian nature performed for the Government. It is true that some of the camps were run by religious groups, but they were not privately owned and operated. They were federal camps. They were under federal control. There were elaborate regulations made and published by General Hershey, the Director of Selective Service. The religious camp directors of the different religious camps were acting as agents of General Hershey. They were, therefore, agents of the Government. The conscientious objectors in the camps were, therefore, working for the Government and not for private or nonfederal employers.

Let us turn now to a consideration of the leading cases on the Thirteenth Amendment to the Constitution. The draft law cases, although not in point, shall be considered first.

In the Selective Draft Law Cases (*Arver v. United States*), 245 U. S. 366, Chief Justice White (at page 390) held, without discussion, that compulsory military service did not violate the Thirteenth Amendment.

Angelus v. Sullivan, 246 F. 54 (Cir. Md.), held that the 1917 Act did not illegally interfere with the rights of the person contrary to the Thirteenth Amendment.

United States v. Brooks, 54 F. Supp. 995 (S. D. N. Y.), involved a question of whether the provisions of the Selective Training and Service Act requiring civilian work in a public service camp was invalid. The United States Court of Appeals for the Second Circuit sustained the holding of the lower court that the act was valid. (147 F. 2d 134.) The same holdings were made in *Weightman v. United States*, 142 F. 2d 188 (1st Cir.), and in *Heflin v. Sanford*, 142 F. 2d 798 (5th Cir.).

In *United States v. Brooks*, 54 F. Supp. 997 (S. D. N. Y.), the Thirteenth Amendment argument was based "on the treatment by the defendant of the provisions for work of national importance as completely severed and independent from the comprehensive mobilization contemplated by the Selective Training and Service Act." The court said that it must be treated as a part of the mobilization of all manpower. The argument of defendant was reduced to an absurdity. The court said the registrant contended he could be inducted into the army but could not be put in a camp in recognition of conscientious objectors. Defendant seemed to make the argument that the conscientious ob-

jector was singled out and discriminated against. The court said that the fact that the work was under civilian direction was immaterial because such work could be directed by either a civilian or the military. "Nor does it matter that the actual labor performed by the assignees is not directly in aid of the defense of the United States or of its military establishment. It is sufficient that in the judgment of Congress such labor is of national importance; that its performance by assignees releases others for services more directly concerned with military action; and that assignment of conscientious objectors tends to deter others from asserting a claim to exemption." Page 997.

The Second Circuit held in *Brooks v. United States*, 147 F. 2d 134, as follows:

"The federal government in the exercise of its undoubted power to raise and maintain armed forces for the protection of the country could have disregarded the appellant's conscientious scruples against participating in such service and conscripted him for any military service which he was mentally and physically fit . . . Congress could in the exercise of its incidental power do whatever was reasonably necessary and appropriate to raise and maintain armed forces provided that those who were given exemption from such services be required to perform such work of national importance as they were able to perform under reasonable rules and regulations. There are many good reasons which may have led Congress so to provide but it is enough that such action may have been con-

sidered needed during a great national emergency for its effect upon the moral of those who do serve in the armed forces.” Pages 134-135.

Weightman v. United States, 142 F. 2d 188 (1st Cir.), involved an attack against the constitutionality of the 1940 Act in its provisions for treatment of conscientious objectors. The power of the President to designate the forestry work and the low pay, described as slavery and imprisonment in the conscientious objector camps, were questioned. The court rejected all arguments. The court, among other things, said:

“Possibly the system established ‘may be condemned by some as unwise or liberal or unfair’ (Cardozo, J., concurring in *Hamilton v. Regents*, 293 U. S. 245, 266, 55 S. Ct. 197, 205, 79 L. Ed. 343), but this is no basis for holding the system unconstitutional. Since the situation presented by the Act called for ‘the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.’ *Kiyoshi Hirabayashi v. United States*, 320 U. S. 81, 93, 63 S. Ct. 1375, 87 L. Ed. 1774. Under the circumstances we do not believe that the action taken with respect to conscientious objectors has exceeded constitutional bounds. In accord see *Hopper v. United States*, 9 Cir., 142 F. 2d 181; *United States v. Van Den Berg*, 7 Cir., 13 P. 2d 654, and cases cited.” Page 192.

In *Hopper v. United States*, 142 F. 2d 181 (9th Cir.), the requirement for civilian work at a public service camp was attached. It was claimed to be involuntary servitude. The court said:

“These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have been uniformly met with rejection.” Page 186.

The defendant’s claim that the work camp requirement violated the Thirteenth Amendment in *United States v. Van Den Berg*, 139 F. 2d 654 (7th Cir.), was rejected with the following statement:

“Defendant’s claims that his assignment to a conscientious objectors’ camp amounted to imposition of involuntary servitude in violation of constitutional rights; . . . have all been considered fully by this court and denied in *United States v. Mroz*, 7th Cir., 136 F. 2d 221.” Page 656.

Exceptional service such as labor in the federal maritime service or the Navy may be compelled without a violation of the Thirteenth Amendment. It is the same as the right of the federal Government to conscript manpower for military service. A consideration of the cases on the point shows that such services are, like military service, exceptional. They may be compelled as an exception to the general rule commanded by the Thirteenth Amendment.

Robertson v. Baldwin, 165 U. S. 275, 282-283, held that the federal statute authorizing justices of the

peace to issue warrants to arrest deserting seamen did not violate the federal Constitution, Thirteenth Amendment. This is also the old common law rule. The Supreme Court said:

“It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.” (165 U. S., at page 282) Mr. Justice Harlan dissented. Much of what he says applies as argument in favor of the appellant here. See pages 288-303.

The compulsory road work law of Florida was held not to violate the Thirteenth Amendment because the services called for were exceptional and akin to the usual compulsory duties that every citizen owed the government. The work was likened to military service and jury duty, which are not forbidden by the Thirteenth Amendment. (*Butler v. Perry*, 240 U. S. 328, 333.) The Court said:

“The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. *Slaughter House Cases*, 16 Wall. 36, 69, 71, 72; *Plessy v. Ferguson*, 163 U. S. 547, 542; *Robertson v. Baldwin*, 165 U. S. 275, 282; *Clyatt v. United States*, 197 U. S. 207; *Bailey v. Alabama*, 219 U. S. 219.”

A case similar in its holding is *Plessy v. Ferguson*, 163 U. S. 537. That case involved a Louisiana law that provided for separate but equal accommodation for both black and white passengers traveling on railroads in the state. The Court held that the law did not violate any of the rights of a railroad employee convicted under the law. 163 U. S., at pages 542-543.

Mr. Justice Black in *United States v. Petrillo*, 332 U. S. 1, 13, stated that the criminal sanctions of the Communications Act punishing coercion in broadcasting did not violate the Thirteenth Amendment on its face. He indicated that the application of the statute may present the question. Thus it is a question whether it is void as construed and applied.

A New York Statute making it a crime for a landlord not to provide usual apartment house services on an equal basis to all tenants did not violate the Thirteenth Amendment. (See *Marcus Brown Holding Company, Inc. v. Feldman*, 256 U. S. 170, 199.) The Court said:

“It is true that the traditions of our law are opposed to compelling a man to perform strictly

personal services against his will even when he has contracted to render them.”

In *Auto Workers v. Wisconsin Employment Relations Board*, 336 U. S. 245, it was held that the law for collective bargaining between the employer and union did not violate the Thirteenth Amendment. The statute was sustained because it did not make it a crime to quit a job. 336 U. S., at page 251.

In all the cases quoted from above (except in the case of the seaman, which is special—finding its background of exemption from the rule in the common law) none of them involved service performed for a private person. They all involved forced service of an exceptional or emergency or special nature, to the state.

The peonage cases are directly in point here. They will not be considered in this section of the argument. But, before they are stated, let a few general remarks be made to show that they apply.

It was compulsory private labor that was prohibited by the Thirteenth Amendment and the Anti-Peonage Law. In every case there was involved a state law or custom that produced the forced labor for private purpose. Had the laws been passed by the Congress instead of the state governments the results would have been the same. The Thirteenth Amendment would have invalidated the custom or laws even by the Federal Government compelling the work either directly or indirectly.

What is done by the Congress here is identical to that which was done by the state governments and condemned in the peonage cases. Here there is compulsory work of a nature that does not come within the recognized exception of the Thirteenth Amendment, such as military service. The peonage cases would prohibit the drafting of young men as soldiers and putting them to work on the King Ranch in Texas or in the Broadway Department Store in Los Angeles. Soldiers could not be put in the state hospital to take care of mentally ill people without its being a violation of the principle of the peonage cases by the Supreme Court. Since a soldier cannot be thus drafted for compulsory labor without a violation of the Thirteenth Amendment, then the President also violates the Amendment when he orders a conscientious objector to work in the state hospital. The Amendment and peonage cases prohibit what is done in this case by the order made under Section 1660.1 of the Selective Service Regulations.

Let us turn our attention now to a consideration of the peonage cases.

A very good discussion of the Thirteenth Amendment, its background and the earlier decisions under it appears in *Pollock v. Williams*, 322 U. S. 4, 7-13. The Court, at page 17 of the opinion, held that the Florida law imposed peonage upon certain persons under certain conditions. The statute made one who obtained an advance of money upon an agreement to render service guilty of a misdemeanor. The law provided for a presumption of fraud on the showing of

obtaining the money on such agreement. This case involved the federal act passed to implement the Thirteenth Amendment. It is the law against peonage. (322 U. S., at page 8). The Thirteenth Amendment, without a special act, has teeth against an act of Congress. (See *Hurd v. Hodge*, 334 U. S. 24, at pages 31-32.) Mr. Justice Jackson for the majority of the Court said:

“The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basis system of free labor. For example, forced labor has been sustained as a mean of punishing crime, and there are duties such as work on highways which society may compel.” *Pollock v. Williams*, 322 U. S., at pages 17-18.

In the *Slaughter House Cases*, 16 Wall. 36, the Court held that the Thirteenth Amendment was not limited to protection of the Negro or to a prohibition of slavery. See 16 Wall., at pages 69, 71-72.

The other peonage cases, like *Pollock v. Williams*, 322 U. S. 4, lay down the rule that there can be no indirect violation of the Thirteenth Amendment. Criminal sanctions cannot be used to punish one who refuses to do forced labor or violates a labor contract. By force of the same reason the Amendment prohibits the use of the war-powers section of the police power of the state to be used to compel performance of work not of an

exceptional character coming strictly under the old common law practice of service to the state of a nature which can be compelled. If the service does not relate directly to the war effort it cannot be said to be exceptional. It is not, therefore, an exception from prohibited forced labor under the Thirteenth Amendment purely because it was attached to war law. It is fundamental that the Constitution deals with realities and not with shadows. (*Cummins v. Missouri*, 4 Wall. 277, 325; *Ex parte Milligan*, 4 Wall., 2, 120-121.) And there must be a direct relationship between the end aimed at and the power exercised.

Indirect and remote purposes or ends cannot be sustained purely because Congress has chosen to say they are to be done. Compare the other peonage cases (*Baily v. Alabama*, 219 U. S. 219, and *Taylor v. Georgia*, 315 U. S. 25) with *Pollock v. Williams*, 322 U. S. 4.

Hodges v. United States, 203 U. S. 1, involved an indictment seeking enforcement of the criminal sanctions clause of the Civil Rights Act. While the dismissal of the indictments was ordered the court wrote on the subject of "involuntary servitude" words used the Thirteenth Amendment. The Court said: "The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to com-

mit that race to the care of the Nation. It is denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof.” 203 U. S., at pages 16-17.

It is submitted, therefore, that the order for the appellant to perform work at Los Angeles County Department of Charities and the regulations authorizing such order constitute a construction and application of the statute which makes it unconstitutional, because it is brought into conflict with the mandate of the Thirteenth Amendment.

C. The Act, as Construed and Applied by the Regulation and Order, is Unconstitutional Because it Deprives the Defendant of Due Process of Law Contrary to the Fifth Amendment to the Constitution.

The due process clause under the Fifth Amendment, as stated under Section 684 of Volume 12 of American Jurisprudence on “Constitutional Law,” requires “ . . . that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained.”

The Court’s attention is called to the case of *Ex Parte Mitsuye Endo*, 323 U. S. 283. This case held *habeas corpus* proper to secure the release of a conceded loyal citizen who was being illegally detained

by the War Relocation Authority under presidential executive power. The Supreme Court, speaking through Justice Douglas, after calling attention to the constitutional safeguards against improper exercise of the war power, one of these being "due process" under the Fifth Amendment (See page 299), ruled that a concededly loyal citizen presents no problem of espionage or sabotage and since the power to detain is derived from the power to protect the war effort against espionage and sabotage, the detention, which had no relation to that objective, is unauthorized. The force of the reasoning in that case falls upon this case here before the Court.

It is to be noted that the Supreme Court of the United States as early as *Ex parte Milligan*, 4 Wall, 2, 120-121, has held that the Fifth Amendment is a valid bar against the improper exercise of the war power. The *Milligan* case involved the release on *habeas corpus* of a civilian who had been sentenced to death upon a military trial during the Civil War in the state of Indiana, where federal court trial was available. Compare *Cummins v. Missouri*, 4 Wall. 277, at page 325.

While some of the cases dealing with the exercise of the war power speak of the presumption of regularity attaching to presidential and other official acts, nevertheless, the Supreme Court itself has recognized such presumption will be of no avail where a presidential war order is clearly shown to be arbitrary and repugnant to the Federal Constitution. See *Highland v. Russell Car & Plow Co.*, 279 U. S. 253, at pages 261 and 262.

A Selective Service case deemed worthy of mention on this question is *United States v. Emery*, (2d Cir. 1948) 168 F. 2d 454. The prosecution was under the 1940 Act for a conscientious objector's leaving detached service "for which he had volunteered." He had previously been hired out as a voluntary laborer from a Civilian Public Service Camp "to do private dairy herd testing." The prevailing wages for this farm-out laborer were paid to his employer, the Federal Government. Out of his wages he was paid the \$15.00-a-month Civilian Public Service Camp allowance by the Federal Government. The balance of his wages was paid into a separate fund of the United States Treasury.

The appellant was not a volunteer. The *Emery Case* supra, is not in point. It is to be noted that the United States Court of Appeals for the Second Circuit held that, as to the wages paid the defendant, his rights under the First and Fifth Amendments had not been violated. The court at 168 F. 2d 454, page 456, said:

" . . . The conscientious objector cannot refuse to perform his work of national importance even if he thinks he is being underpaid and acts on conscientious scruples to avoid what he considers the status of contract labor."

The language was *dictum*, since the defendant was in no position to assert the defenses because he had volunteered for the work he later questioned. Had it been without his consent the case would have been different. Also, the points on forced labor were not presented in

that case, as they have been here, which distinguishes that case.

It is submitted that inasmuch as the appellant in this case did not consent to the work and since he was ordered to do work that is not in the "national" or "federal" interest or welfare as distinguished from "state" or "local" welfare, and because the work is against his wish, it is plain that he has been deprived of his rights contrary to the due process clause of the Fifth Amendment to the Constitution.

D. Section 462 (a) of the Act and Part 1660 of the Regulations, Insofar as They Have Been Construed and Applied to the Defendant Constitute an Unreasonable Abridgement of His Right of Freedom of Religion Contrary to the First Amendment to the United States Constitution.

Congress has seen fit to grant exemption to ministers and deferments to conscientious objectors. Both are recognitions of the relative importance of religion and conscience in our way of life; they are recognitions that the minister in the pursuit of his vocation contributes vitally to the nation's welfare and that the conscientious objector can also so contribute in a manner consistent with his scruples against participation in activity abhorrent to him or inconsistent with his religious commitments.

Assuming that the appellant presented satisfactory evidence that his vocation was the ministry, within the selective service definition, and that this evidence

stands un rebutted it would necessarily follow that the denial of a IV-D classification to him was arbitrary and illegal.

Dickinson vs. United States, 74 S. Ct. 152.

There is no question but that defendant presented satisfactory evidence that he was a conscientious objector. The selective service system became convinced that he was one and classified him in Class I-O.

This is important for the following reason: the sole and avowed basis of defendant's conscientious objection to participation in military activity is his dedication to his ministry. [Ex 16] He is not one of the 124 types of pacifist conscientious objectors; he is a conscientious objector solely because he faces "everlasting death" if he compromises with his dedication to his ministry. His answers on the SSS Form No. 100, on the SSS Form No. 150 and other documents in his file made clear he is not a pacifist. Since the law proscribes a philosophic basis and a purely personal moral code the only legal reason left for the board to give him a I-O classification was his ministry dedication.

Appellant's file presented considerable evidence that the ministry was his vocation and his court testimony (concerning what he tried to tell the board at his personal appearance before it) was definite and detailed that his dedication to this work called for all the time he could take away from the task of earning a living for his wife and himself.

We are not arguing here the basis-in-fact question; the amount of time, gross or proportionate, that he devoted to secular or to religious work is not in point here, even if it should actually be in point in a determination of the basis-in-fact problem.

We are here arguing that once it is found to be a fact that a registrant truly has dedicated his life to religious service (and this is implicit in the finding of the selective service system) his freedom of religion is abridged when he is compelled to remove himself from the area of his religious work to do secular work that prohibits him from following his calling. Put another way, and very briefly, a selective service registrant, such as this appellant, after a finding of fact such as we have here, must be free to "witness" his faith and to respond to the promptings of his call. In short, a governmental agency is constitutionally barred from interfering with the religious work of such a person; if Selective Service is legally qualified to determine the locale of the missionary activity and ministry of its registrants, absent a state of war, then the Department of Labor is equally qualified to tell the rest of us where to work in times of peace.

III.

APPELLANT WAS DENIED PROCEDURAL DUE PROCESS OF LAW IN THAT HIS LOCAL BOARD HEARING WAS UNFAIR AND IN THAT HIS CLASSIFICATION WAS NOT REOPENED WHEN IT SHOULD HAVE BEEN.

A. The Undisputed Evidence was that Appellant's Local Board Accorded Him Only Five Minutes for His Appearance Before Local Board, on December 10, 1951, Although he had Prepared Material for Presentation on His Minister's Classification Claim that He was Unable to Present Because of the Arbitrary and Unreasonable Shortness of the Time Allowed Him. [Ex. 26; R 35-.....]. In Fact, Only Three Minutes Were Available to Him. [R 51].

The ministry of Jehovah's witnesses is not well understood by local draft boards. To many persons it is incomprehensible that anyone, particularly a young person, will dedicate his life to an altruistic or religious enterprise of an "unorthodox" nature. The priesthood, the foreign-field missionary work and other more usual religious activities are quite well understood; however, the willingness of the door-to-door evangelist to endure the inevitable rebuffs (to mention but one of the obvious burdens of the work) is not comprehensible. Neither does the persistence and the occasional aggressiveness of some of the Jehovah witness missionaries make local board members sympathetic to the claims of

their Jehovah witness registrants. Although the board members are to serve in a judicial capacity they often do not bring a judicial attitude to their work; while prejudice is not claimed here indifference is. The board members knew the Appearance Before Local Board was appellant's only opportunity to meet them face to face; that he was entitled to discuss his file, to argue his evidence, to point out and to explain items in it that may have been stated in language having a unique meaning to the Jehovah's witness, and to give them new and further evidence. See §1624.2 of the Regulations. Confining the usual registrant to five minutes might be fair and reasonable; so confining one with the burden of establishing his right to a minister's classification, and, moreover, one of Jehovah's witnesses is almost on its face unfair. The definite and detailed courtroom testimony of appellant [R 36-42] concerning the items of his ministerial activity he had planned to present to the board (and unrebutted) demonstrates the unfairness of the five minutes limitation.

The explanation given in court [R 36-42], if heard by the local board, might have resulted in a different classification. This explanation, if included in the summary of the Appearance Before Local Board, might have resulted in a different Appeal Board classification. In any event, its absence from the summary, because of the arbitrary time limitation, was an unfair diminution of his appellate record. *Bejelis vs. United States*, (6th Cir., July 26, 1953) 206 F. 2d 354, 356; *Davis vs. United States*, (6th Cir., Nov. 12, 1952) 199

F. 2d 689, 691; *United States vs. Zieber*, (3d Cir., April 28, 1947) 161 F. 2d 90, 92; *United States vs. Stiles*, (3d Cir., 1948) 169 F. 2d 455, 457.

B. Nevertheless, it is the Attitude of Many Persons (and Doubtless of Many Local Board Members) that it is Not Enough for a Jehovah Witness Registrant to Be a Genuine Missionary or Evangelist, in Order to Be Entitled to a Minister's Status: It is Believed by Some He Must Also Occupy One of the Higher Echelons of the Sects' Hierarchy. Although the Regulations Do Not Impose Such a Higher Standard, This Appellant in Time Became Able to Meet It.

Therefore, when appellant presented new and further evidence that he was one of the "servants" of the congregation and, in fact, that he ranked next to the very top servant in his band of missionaries, his new evidence warranted formal reconsideration of his classification by his local board. Section 1625.2 so provides:

"When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classi-

fied, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Appellant's selective service file shows that he informed the board on October 22, 1953 that he had become Area Study Conductor [Ex 102-]; he later showed he had been entrusted with the responsibility of being Assistant Presiding Minister [Ex 133]. On neither occasion was his classification reopened. Even if he had been reclassified into the same class he would have had an administrative appellate opportunity. As the problem was handled by the board, he was precluded from having an appellate opportunity by the board's refusal to reopen. Such handling was condemned in *United States vs. Clark*, 105 F. Supp. 613, 164-615, in *United States vs. Crawford*, 119 F. Supp. 729, 730, and in *United States vs. Williams*, No. 8917 D. Conn., April 2, 1954. See Appendix A. This is also true of *In re Abramson*, 196 F. 2d 261 and the argument is supported by *Hull vs. Stalter*, 151 F. 2d 633.

CONCLUSION

Appellant has been denied due process of law and the judgment of conviction should be reversed.

Respectfully submitted,

J. B. TIETZ,

Attorney for Appellant.

Appendix



APPENDIX A

[TITLE OF COURT AND CAUSE.]

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
No. 8917 CRIMINAL**

**UNITED STATES OF AMERICA
vs.
ROBERT JAMES WILLIAMS**

FINDING OF FACTS MEMORANDUM OF OPINION

Defendant was indicted March 2, 1954 in one count for violation on April 20, 1953 of 50 App., USC 462(a) by wilfully and knowingly failing and refusing to submit to induction into the armed forces of the United States.

Defendant declined to be represented by counsel, pleaded not guilty, waived jury trial and was tried to the Court March 18 and 19, 1954. At the close of the trial defendant moved to dismiss the complaint, for a finding of not guilty and judgment of acquittal.

There is no question but that defendant was classified 1-A, ordered to report for induction, reported, and deliberately refused to be inducted.

Defendant filed his classification questionnaire December 18, 1951, making no claim of either ministerial

exemption or conscientious objection classification, asking 4-A classification on the basis of a hip fracture almost six years previously. He was classified 1-A January 9, 1952 and classification card mailed January 11, 1952. On December 5, 1952 defendant was sent by mail an order to report January 16, 1953 for armed forces physical examination. December 8, 1952, defendant was notified by letter that the date for physical examination was changed to January 23, 1953.

On January 5, 1953 the board received a letter from defendant asking a change of classification to that of minister, accompanied by affidavits from four Jehovah's Witnesses in support thereof. The letter and affidavits purported to be dated and notarized on various dates from November 18, 1952 to January 5, 1953.

The Board on January 5, 1953 sent defendant a conscientious objector form 150, telling defendant to send it in and they would consider reopening his case, but to report as scheduled for physical examination. Defendant appeared, was examined, was accepted and a certificate of acceptability mailed to him.

He then wrote the Board a letter received February 6, 1953 stating that he was appealing the certificate of acceptability on the ground of his claim to ministerial exemption although conceding that he was physically and mentally fit for service.

At a date not established, defendant returned the form 150 claiming to be opposed to participation in war as a minister of Jehovah's Witnesses.

The board scheduled a hearing on March 4, 1953 on his request for reopening his classification.

The board wrote State headquarters, apparently asking advice on procedure, or the presence of Deputy Director Hennessey at the hearing. Hennessey was on vacation, but the board was advised to forward the cover sheet if it desired an opinion on procedure. It did not do so.

Defendant appeared at the hearing March 4 and testified that he claimed to be a minister as all Jehovah's Witnesses were ministers, that he worked 25 to 30 hours a week or 100 hours a month at his house to house and street ministry, while working 40 hours a week at General Electric, earning about \$70 a week. He was then almost 20 years of age, and had been interested in Jehovah's Witnesses and their teachings only since about February 1952.

One of the board members, Minotti, explained several times during the hearing that a minister was a full time job. It would appear that he believed that any outside employment would disqualify a minister from exemption.

Defendant explained at the hearing his conscientious scruples against participation in war, but twice told the board that he was not claiming deferment as a conscientious objector, but exemption as a minister.

The board voted 6-0 not to reopen defendant's case and so notified defendant on March 5, 1953. The board had told defendant both at the beginning and end of the

hearing that he had no right to appeal if they did not reopen.

March 16, 1953 defendant was notified to report on April 20, 1953 for induction. Defendant reported on the date required but refused to take the oath.

No appeal lies from a certificate of acceptability. The sole question here relates to the board's procedure in handling the request to reopen the 1-A classification so as to eliminate any possibility of appeal from its action.

In this case the board might well have been justified, upon a consideration of reclassification on the same evidence presented at the time of its consideration of whether or not to reopen Williams' classification, to disbelieve his claims as to his vocation, and to deny him deferment as a minister. He is clearly incorrect in his claim that his ordination by baptism and the belief of the Witnesses that all those baptized are ministers bring him within the exemption of the Act. The restricted definition of minister in the Act was intended to exclude those who, like Williams, carried on full time secular work, engaged in preaching and distributing literature only part time, and might be found not primarily in charge of ministering to the spiritual needs of a flock.

It should be borne in mind that there is no constitutional prohibition against the drafting of ministers of the gospel, and that the exemption was placed in the Act principally to avoid depriving the members of religious

groups of those on whom they depended for religious leadership and guidance.

One of the board, to be sure, felt, and so informed Williams, that the Act only exempted those who were engaged in religious activity 24 hours a day to the exclusion of all secular work. This is erroneous. The question is, which is the vocation, the religious or the secular work? It is not established that the majority of the board had the same interpretation. Williams had the burden of convincing the board that his vocation was religious, and failed to do so.

It may be that the failure to reopen to give consideration to William's formal claim of conscientious objection in Form 150 was not erroneous, since he twice in his oral testimony after filing the form disclaimed any intention to ask deferment as a conscientious objector.

Were this an appeal from the board's decision in a hearing on reclassification after reopening on the facts before it, we should probably find that there is no error on the merits in the refusal to reopen.

There persists, nonetheless, a question as to whether the review on the facts provided by the Act and regulations within the Selective Service System was accorded to this registrant, and if not, whether the review denied him might have changed his classification. Had this case been reopened and considered by the appeal board on the evidence as to conscientious objection it is hard to see how the board could have refused a deferment

under the case of *Dickinson v. U. S.*, 346 U. S. 389, unless there was an affirmative finding that the evidence lacked credibility. Had the boards made a finding that Williams' late found interest in religion, arising after his 1-A classification, was a sham and a parroting of formulae designed only to avoid the service required under the Act, the courts on the record here might well be required to uphold the board in spite of the *Dickinson* opinion. Since there was no reopening and no chance for appeal provided, however, we have no way of knowing how the board or a hearing officer on appeal, and an appeal board, would have found on this point.

Procedurally, the prejudicial error on the part of the board was in the failure to reopen and reclassify under 32 C. F. R. 1625, even if in the same 1-A classification, or to classify or decline to reclassify under 32 C. F. R. 1624, so that appeal time would again be allowed. As indicated below, 1624 does not appear to be applicable under the facts of this case.

If the board found the application to reopen was on its face frivolous or sham, only meant to delay induction, the regulations do not force it to reopen. On the face of the regulations, it was required to reopen, however, if the request to reopen was accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification. 32 C. F. R. 1625.2.

A reading of 32 C. F. R. 1624 would appear to indicate that it is not applicable here, since far more than the 10 days after notice of classification had passed before the registrant asked for a hearing. The board apparently did not consider it a hearing under 32 C. F. R. 1624, for it advised the registrant that he had no right to appeal from a refusal to reopen. If the hearing had been one under 1624, such a right would, however, have been the registrant's under 1624.2(e). The board apparently considered its hearing and interview with the registrant as an informal questioning to keep itself currently informed under 1625.1(c). This, however, ignored the written evidence in the request to reopen, the four affidavits of ministerial status and the form 150, which, if true, would have required reclassification and, therefore, required consideration by the board and action thereon reopening and either classifying again as 1-A reclassifying in another classification if the board found that course justified, with a right to appeal within the Selective Service System.

Determination of the proper classification of this registrant is for the Selective Service Boards. His claim of change of status to that of a minister raised a question which required the local board to reopen and give formal consideration to his claim and the evidence submitted in behalf thereof, thereby preserving his right to a review by the appeal board.

Since the board failed to do this, the order to report for induction was based on an invalid classification, and

the defendant must be acquitted of the crime charged in this case.

The Court finds the defendant not guilty.

Dated at Hartford, Connecticut, this 2nd day of April, 1954.

J. JOSEPH SMITH

United States District Judge

(Underscoring supplied)

APPENDIX B

1622.43 Class IV-D: Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:

- (1) Who is a regular minister of religion;
- (2) Who is a duly ordained minister of religion;
- (3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or
- (4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of title I of the Universal Military Training and Service Act, as amended, contains in part the following provisions:

“Sec. 16. When used in this title— . . . (g) (1) the term ‘duly ordained minister of religion’ means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites

and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

“(2) The term ‘regular minister of religion’ means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

“(3) The term ‘regular or duly ordained minister of religion’ does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.”

No. 14,596
IN THE
United States Court of Appeals
For the Ninth Circuit

JERRY LEE REESE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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No. 14,596

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JERRY LEE REESE,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 3231 of Title 18 United States Code and Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on July 21, 1954 for failing to report to his local board for instructions to proceed to a place of employment for the purpose of civilian work contributing to the maintenance of the national health, safety and interest (Tr. 3, 4). On September 9, 1954 appellant was tried before United States Dis-

trict Judge Oliver J. Carter (Tr. 12). After denial of a motion for acquittal, appellant was adjudged guilty as charged (Tr. 9). Timely appeal was taken to this Court from that judgment (Tr. 11).

FACTS.

Appellant registered with his local board on August 3, 1949 (File 1, 2). He filed his classification questionnaire on July 6, 1949 (File 6). In this form he listed the job he was then working at as construction work (File 8). On September 8, 1950 he filed his Special Form for Conscientious Objector (File 19). He stated that the leader of his congregation was Mr. Fred Howell, Sacramento and Nord Avenues, Chico, California—Company Servant (File 21). On December 10, 1951 appellant had a personal appearance before his local board (File 26). At this personal appearance he was *asked* if he had attended or graduated from a recognized Theological Seminary or Bible Institute (File 26). Appellant, at page 4 of his brief, declares that his claim for a minister's classification was rejected "apparently because he had not 'attended or graduated from a recognized Theological Seminary or Bible Institute.'" There is nothing in the record which indicates that such was the case. The file only reveals that appellant was *asked* this question.

Appellant was classified by his local board in Class I-A on December 10, 1951 (File 36). He appealed this classification on December 19, 1951, listing two grounds—(1) that he was a minister and (2) that

he was conscientiously opposed to participation in war (File 34). The Appeal Board on January 10, 1952 classified him I-O (File 36). On September 17, 1952 appellant filed his Special Report for Class I-O Registrants (File 66). On page 68 he listed various jobs he had held since April 1, 1949. He declared he was still employed by Milan and Lund, Brick Contractors, as an apprentice bricklayer. On October 23, 1952 he filed an Apprentice Deferment Request (File 73).

On February 24, 1953 the local board requested appellant to indicate his preference of three jobs which had been approved for the employment of conscientious objectors (File 76). Appellant, in accordance with this request, stated that he applied for an occupational deferment as an apprentice bricklayer and declined to take any other occupation "than my present one" (File 77).

On August 12, 1953 appellant again appeared before his local board. The summary does not indicate that he discussed his ministerial claim at that time (File 96). On October 22, 1953 appellant wrote a letter in which he claimed that he was presenting new evidence in his case (File 102). He there stated that he was an "Area Study Conductor." In addition, he stated "My wife and I are planning now so that by next summer we will be able to enter the full time ministry and devote 100 hours a month each in regular preaching activity (File 103)." On November 4, 1953 the local board reviewed "the complete file" of appellant and did not change appellant's classifica-

tion (File 108). On February 15, 1954 appellant was ordered to report to his local board on February 25, 1954 for instructions to proceed to his place of employment (File 131). On February 23, 1954 he acknowledged receipt of this order and requested a personal appearance (File 133). This request was received on February 26, 1954 by the local board, one day after the appellant had failed to report as ordered (File 133, 138).

QUESTIONS PRESENTED.

1. Did appellant exhaust his administrative remedies?
2. Is there basis in fact for denying a ministerial classification where the registrant works as a full time bricklayer?
3. Is the conscientious objector work program constitutional?
4. Was appellant deprived of a fair hearing?
5. Did the failure to reopen appellant's classification deprive him of due process of law?

ARGUMENT.

I. APPELLANT HAS NOT EXHAUSTED HIS ADMINISTRATIVE REMEDIES.

Appellant refused and failed to report to his local board on February 25, 1954 for instructions to proceed to the place of employment designated by the

board (Tr. 15, 19). By failing to report, he neglected to complete the administrative process.

In *Falbo v. United States*, 320 U.S. 549, the Supreme Court held that where a conscientious objector had failed to report for work of national importance, he had not exhausted his administrative remedies and was not entitled to judicial review of his classification. There has been no intimation that the *Falbo* case has been overruled. This Court should not do so now.

In *Williams v. United States* (9th Cir.), 203 F.2d 85, this Court declared that the Act "requires a registrant to come to the brink of induction before he may obtain judicial review . . . Prior to the time when a selectee is found acceptable any injury has not materialized since he might be rejected" (at page 88). See also *Rowland v. United States*, 207 F.2d 621; *Estep v. United States*, 327 U.S. 114, 115-116. This Court has recently reaffirmed the principle that there is no judicial review where a registrant has failed to report in *Mason v. United States* (9th Cir.), No. 14,286, decided December 9, 1954.

In this case if appellant had reported, the position which he was ordered to might have been filled. Transportation might not have been available. The letter the local board received on February 26 could be acted on perhaps favorably to his claim. More important, the County of Los Angeles might have refused to hire him after an opportunity to look at him in person. They very well might have decided that he was neither morally nor emotionally fit to do

the important work of the Los Angeles Department of Charities. Appellant's frantic efforts to avoid service might indicate the kind of personality which would not fit in with welfare work.

The United States District Court for the Southern District of California has held that the "brink of induction" in conscientious objector work cases is reporting to the local board. *United States v. Sutter*, 127 F. Supp. 109. We think, however, the administrative process properly is not exhausted until the registrant is found acceptable by his place of employment.

II. THERE IS BASIS IN FACT FOR DENYING A MINISTERIAL CLASSIFICATION WHERE A REGISTRANT WORKS AS A FULL TIME BRICKLAYER.

Section 16(g)(3) provides as follows:

"The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

The evidence before the local board is undisputed and it is apparently admitted by appellant (App.

Br. page 14) that Reese earned his living as a bricklayer. Appellant even asked for deferment on that ground (File 77). Even though the file reveals that appellant incidentally or irregularly preached and taught the principles of his religion, he was not entitled to deferment if his primary vocation was that of a bricklayer. In *Dickinson v. United States*, 346 U.S. 389, the situation was that the defendant's primary vocation was as a minister and he worked as a photographer incidentally for a limited period of time. In our opinion, there is not a scintilla of evidence in the file that Reese was acting at the time of his classification as a full time minister. He, himself, declared in his conscientious objector form that one Fred Howell was the leader of his congregation (File 21). But the only question in these cases is whether there was a basis in fact for the administrative agency to act as it did. Is there basis in fact for a local board to deny a ministerial classification where a registrant works as a full time bricklayer and applies for deferment as an apprentice? To ask this question is to answer it.

III. THERE IS NO EVIDENCE THE LOCAL BOARD REJECTED APPELLANT'S CLAIM BECAUSE HE HAD NOT ATTENDED A THEOLOGICAL SEMINARY.

Appellant argues vigorously that the local board rejected his claim for deferment as a minister on the ground that he had not attended a religious seminary. He cites a number of cases which, in his opinion, hold that such action by a local board would invalidate

his classification. It might be argued that the Appeal Board was set up to correct such mistakes by the local board. This Court has held to that effect in *Tomlinson v. United States* (9th Cir.), 216 F.2d 12, 16; *Cramer v. France* (9th Cir.), 148 F.2d 801; *Tyrrell v. United States* (9th Cir.), 200 F.2d 8, and *Reed v. United States* (9th Cir.), 205 F.2d 216. However, appellant is setting up a straw man. The local board did not reject appellant's claim on the basis argued by appellant. The local board merely asked a question. Since attendance at one of these schools would be grounds for deferment under Section 6(g) of the Act, this question would appear to be relevant and in appellant's interest. His past attendance at one of those institutions would certainly have a bearing on the question of his present status. Appellant is speculating. The mere fact that someone asks a question is not sufficient evidence to prove that he or the board decided appellant's case in accordance with appellant's answer.

IV. THE CONSCIENTIOUS OBJECTOR WORK PROGRAM IS CONSTITUTIONAL.

Appellant's brief on this question was filed prior to the decision of this Court in *Niles v. United States*, No. 14,452, dated March 16, 1955, holding that the work program was constitutional in precisely the same circumstances as here. This case was decided in the face of exactly the same arguments as are urged here. Appellant, at page 15 of his brief, indicates that the

General Counsel of Jehovah's Witnesses influenced this section of appellant's argument. A comparison with the brief in *Niles v. United States*, supra, indicates that that brief was also influenced by the same hand. For cases adjudging the 1940 program constitutional see *Richter v. United States* (9th Cir.), 181 F.2d 591; *Penor v. United States* (9th Cir.), 167 F.2d 553; *Hopper v. United States* (9th Cir.), 142 F.2d 181; *Atherton v. United States* (9th Cir.), 176 F.2d 835; *Wolfe v. United States*, 149 F.2d 391; *Roodenko v. United States* (10th Cir.), 147 F.2d 752; *Kramer v. United States*, 147 F.2d 756; *Brooks v. United States*, 147 F.2d 134; *United States v. Van Den Berg*, 139 F.2d 654; *United States v. Mroz*, 136 F.2d 221.

V. APPELLANT WAS NOT DEPRIVED OF A FAIR HEARING.

Appellant claims that allowing him five minutes for his appearance was a denial of due process of law. He cites at page 41 of his brief, without any record citations, that the ministry of Jehovah's Witnesses is not well understood by local draft boards. The experience of this Court will indicate to the contrary. The majority of cases which involve ministerial and conscientious objector classification problems have involved Jehovah's Witnesses.

The business of a Selective Service Board does not allow an unlimited presentation of argument by one registrant. The interests of other registrants of the board must be considered. At page 26 of the file the summary reveals that appellant left "the testi-

mony which he had along with him (in written form) for the Board to review.” At the trial below appellant admitted that the written argument was a fair likeness of what he intended to convey to the board at the time of the hearing (Tr. 47). A reading of the record in the Court below indicates that appellant was somewhat at a loss as to what, if anything, of substance he would have presented to the board if additional time had been granted him. As a matter of fact, nowhere in the record does he claim that he asked for more than the five minutes which was granted him. Under these circumstances, it is our opinion that appellant, as in *Tomlinson v. United States*, supra, *Martin v. United States*, 190 F.2d 775 and *Simon v. United States* (9th Cir.), 218 F.2d 127, 130, has not been deprived of a fair hearing before his local board.

VI. THE FAILURE TO REOPEN APPELLANT'S CLASSIFICATION DID NOT DEPRIVE HIM OF DUE PROCESS OF LAW.

Appellant twice requested that the local board reopen his classification. On the last occasion this request was received by the local board *the day after* the failure to report which resulted in appellant's indictment. We do not believe that appellant seriously argues that this request (File 133) has any bearing in this case. Appellant, however, at page 44 of his brief, does argue that this information should have been considered by the board. Perhaps if appellant had reported to work as required, it might have. How-

ever, appellant did not give the board this opportunity. He failed to exhaust the administrative processes so to be himself in a position to benefit from this request.

As to the first request for reopening, that of October 22, 1953 (File 102), the information presented, even if true, would not have warranted a reopening of appellant's classification. In that letter appellant stated "My wife and I are planning now so that by next summer we will be able to enter the full time ministry and devote 100 hours a month each in regular preaching activity (File 103)." The information presented to the board indicated only that appellant intended to become a minister at some time in the future. This would not require a *present* reclassification. When appellant became a minister, then was the time for him to request an opportunity to reopen his classification. From the material in the file apparently appellant never did get around to becoming a full time minister but remained at his usual and customary occupation, that of a bricklayer.

CONCLUSION.

Appellant has not exhausted his administrative remedies. He, therefore, is not entitled to judicial review of his varied claims of error. After being given the conscientious objector classification he requested, appellant refused to even make this small sacrifice for the interests of his country. No error having been demonstrated in either the administrative

processes or in the Court below, we ask that the judgment of conviction be affirmed.

Dated, San Francisco, California,
April 4, 1955.

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No. 14596

In the
United States Court of Appeals
For the Ninth Circuit

JERRY LEE REESE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing

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In the
United States Court of Appeals
For the Ninth Circuit

JERRY LEE REESE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

} No. 14596

Petition for Rehearing

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of the Judgment entered by the Court on August 22, 1955, affirming the judgment of the court below.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features of the decision wherein he believes the court may be convinced its opinion is incorrect.

I.

The opinion does not deal with the important point urged by appellant that he had been improperly denied a reopening of his classification. *None* of the cases

cited by him on this point are even mentioned. Particularly overlooked were the very recent Court of Appeals cases cited in oral argument and presented subsequently, at the Court's suggestion, in a typewritten memorandum:

United States vs. Henderson, 223 F. 2d 421 (7 Cir. June 9, 1955);

United States vs. Ransom, 223 F. 2d 15 (7 Cir., June 16, 1955);

and the older case of

Mintz vs. Howlett, 207 F. 2d 759, 762 (2d Cir., October 27, 1953).

The only place in the opinion where there is reference to this point is on page 12 of the slip opinion, wherein is found:

“He further asserts ‘even if the local board is unconvinced, it should so handle the situation [reopen] so that the registrant has an opportunity for an appellate determination,’ hence ‘appellant was denied due process in both of the above instances.’ ”

The opinion then closed *without the slightest discussion of this subject*. Appellant respectfully submits this must have been an oversight. Appellant believes his point is good and is supported by the cases above cited.

II.

The opinion deals at length (and almost solely) with appellant's complaint that the personal appearance hearing was unfair; yet the opinion does not deal squarely with an important sub-portion of this complaint, namely, that his *oral* presentation was unfairly abridged. The Opening Brief, at page 42, cited §1624.2 of the regulations as giving a registrant the right to discuss his file, to argue his evidence and to point out and explain. A written presentation is no adequate substitute for such oral presentation rights. The Opening Brief cited the appellate decisions of *Davis*, *Bejelis*, *Zieber and Stiles*. The opinion does not even mention them. These "oral" rights were given by the regulation and the curtailment here to 3 minutes was an abuse of discretion.

III.

The opinion holds that "the mere asking of this question [divinity school] by the local board member (without more)" does not bring the facts of the case within the rule used in *Kezmes*. Appellant believes there was more to the situation than the mere asking of the question; that the following should be recalled concerning what occurred at the personal appearance hearing before the local board:

1. All the questions were asked by *the chairman* of the board;
2. All of the five minute hearing was devoted to the *ministry claim* of appellant;

3. The only subject he was questioned on was whether “he had attended or graduated from a recognized Theological Seminary or Bible Institute.” Although the summary of the hearing [Ex. 26] shows only this one particular question on this subject, the sole subject of the questioning, it is appellant’s undisputed testimony that they asked him several questions. [R. 36]

It is, therefore, submitted that the record discloses more than the simple asking of a question; that we have here a *use* of an illegal basis; that the *only* basis disclosed is the illegal one.

Wherefore, upon the foregoing grounds, and for other reasons appearing in appellant’s Brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

REQUEST FOR AMENDMENT

In the event a rehearing is not granted it is respectfully requested that the wording of two portions of the opinion be changed.

The opinion contains the following statements that appellant suggests should be amended:

1. On page 3 of the slip opinion it is stated:

“As to his primary contention above noted, he pinpoints his argument by relying on a recent decision which he assures us is ‘squarely in point’ on this issue—*United States vs. Kezmes*, 125 F. Supp. 300.”

Appellant’s Closing Brief, page 6, reads:

“At least one very recent reported decision has squarely met this issue. In *United States vs. Kezmes*, 125 F. Supp. 300, the Court held that the denial of a minister’s classification because the defendant had no college or theological training was wrong. Also helpful to our factual situation is the statement of the Court on page 302: ‘Again, unfortunately, the local board gave voice to sentiments which *may* have clouded their thinking and been the motivating factors in their final conclusion, i.e., to refuse the IV-D classification. . . .’ [underscoring supplied]. It is to be noted further in the *Kezmes* case that there are two important parallels to the instant case. . . .”

Appellant submits:

- a. He did not assure the Court *Kezmes* is “squarely *in point* on this issue”; he assured the Court that *Kezmes* “has squarely *met this issue*.”
- b. He was using *Kezmes* as helpful reasoning;
- c. He was pointing out some *parallels* in *Kezmes*.
- d. The brief did not attempt to overstate the value of *Kezmes*; appellant frankly argued in his Closing Brief (page 6):

“It is true it is not clear that the lack of attendance at a Theological Seminary or a Bible Institute was the sole or determinative basis for the board’s rejection of his claim. The fact, however, that it was used at all taints the decision. There are a number of cases from other jurisdictions that also support this reasoning, none of which were cited in the Opening Brief.”

2. On page 13 of the slip opinion it is stated:

“Appellant does not indicate in his briefs any reason for departure from the general doctrine announced in our *Niles*’ decision nor does he even refer to that opinion.”

Appellant respectfully reminds the Court:

- a. Appellant’s Opening Brief was written *before* the *Niles* decision;
- b. Appellant’s Closing Brief was on only two (other) points;
- c. During oral argument, in response to the invitation of Judge Bone to comment on the Constitu-

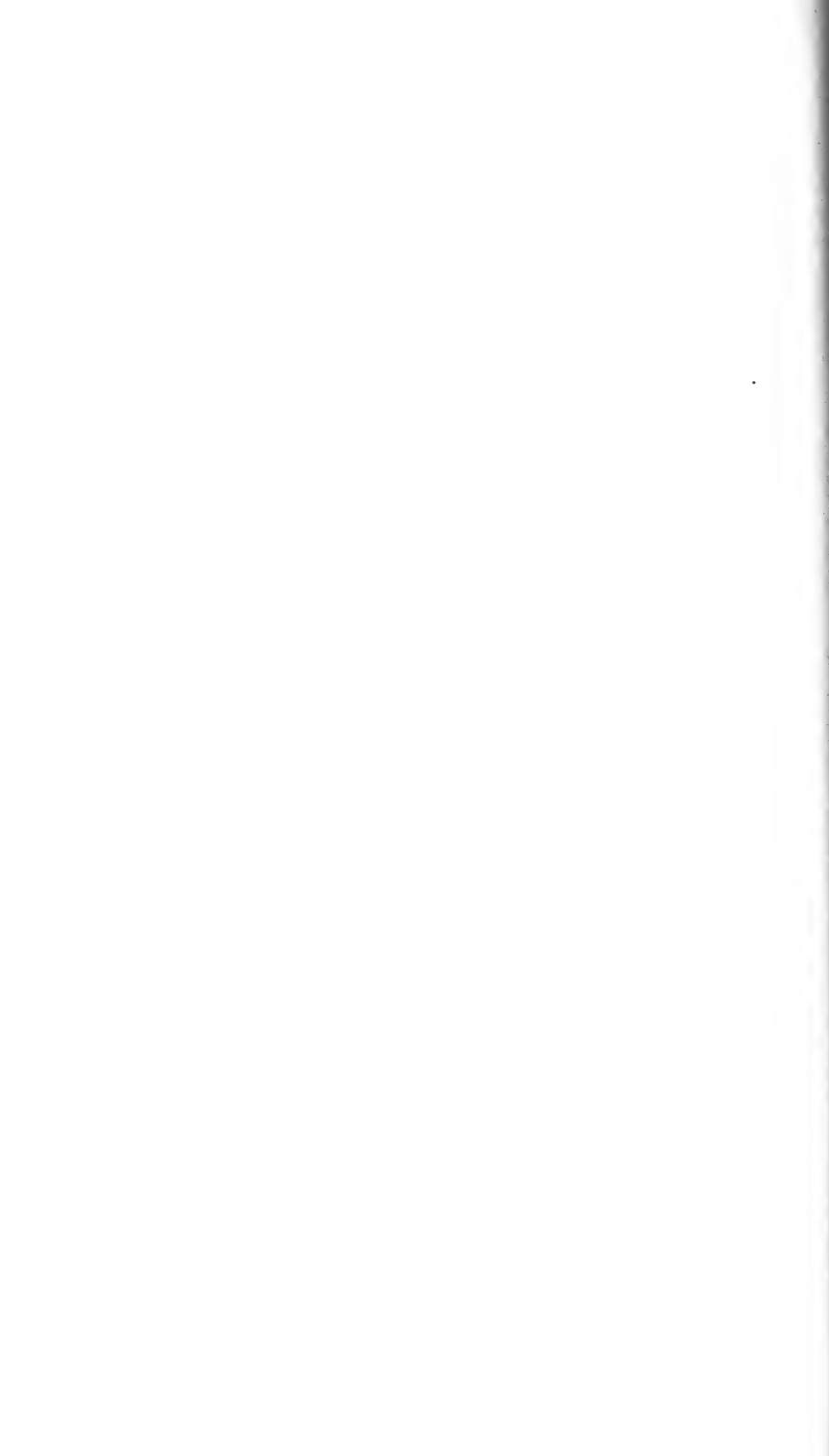
tional attacks made in the Opening Brief, counsel replied that they were abandoned because “You have taken care of them in *Niles*.”

Appellant requests the Court to amend its opinion to conform to the above.

Counsel further represents and certifies: In counsel’s judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ

Attorney for Appellant.



No. 14601

**United States
Court of Appeals**
for the Ninth Circuit

JAMES B. DOYLE,

Appellant,

vs.

OLIVER A. FOX, J. E. PATTERSON and
COREY GABRIELSON,

Appellees.

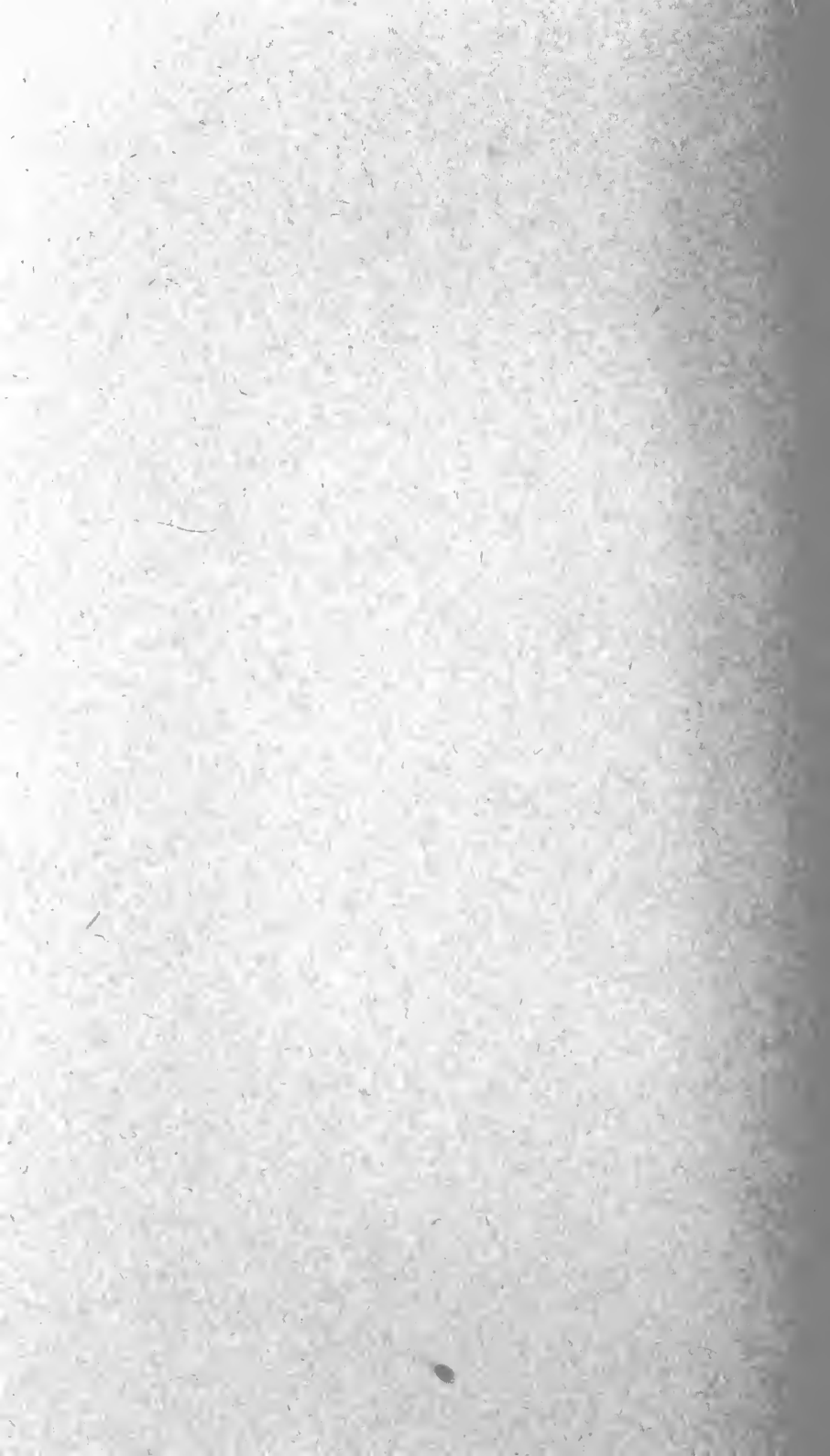
Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

FILED

APR - 5 1955

PAUL P. O'BRIEN, CLERK



No. 14601

**United States
Court of Appeals**
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JAMES B. DOYLE,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the Northern
District of California, Southern Division

No. 31723

JAMES B. DOYLE,

Plaintiff,

vs.

OLIVER A. FOX, J. E. PATTERSON and
COREY GABRIELSON,

Defendants.

COMPLAINT—TREBLE DAMAGES FOR
RENT OVERCHARGES

Plaintiff complains and alleges:

I.

At all times herein mentioned there was in full force and effect the Housing and Rent Act of 1947, as amended (50 U.S.C.A. App. Sec. 1881 et seq.) and the Housing Rent Regulations (Rent Regulation 1) (16 Federal Register 12879 et seq.) establishing maximum lawful rents for housing accommodations.

II.

This action arises under Section 205 (a) and Section 205 (c) of the said Housing and Rent Act of 1947 as amended (50 U.S.C.A., App. Sec. 1895 (a) and Section 1895 (c)), as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

III.

At all times herein mentioned defendants were the owners of certain housing accommodations in the Township of Pleasanton, County of Alameda, State of California, within the defense rental area of Southern Alameda County. Said housing accommodations were and are located on Santa Rita Road between the Town of Pleasanton, California, and the intersection of Santa Rita Road with Highway 50 in Alameda County, California, approximately one mile from Pleasanton, California, and approximately one and one-half miles from the said intersection of Santa Rita Road with Highway 50. Said housing accommodations are and were commonly known and designated as the El Rancho Santa Rita Motel.

IV.

At all times subsequent to January 14, 1952, the plaintiff has been and now is a tenant in possession of the above-mentioned housing accommodations.

V.

At all times herein mentioned the maximum lawful rent for said housing accommodations, pursuant to said Act and Regulations, was and is the sum of \$152.00 per month.

VI.

During the period commencing on or about April 5, 1952, and continuously since that date, the defendants, in violation of said Act and said Regulations, have demanded, accepted and received from

said plaintiff as rent for said housing accommodations sums in excess of the maximum lawful rent for said housing accommodations. On or about April 5, 1952, the defendants demanded, accepted and received from the plaintiff as rent for said housing accommodations for the month of March, 1952, the sum of \$2,000.00. On or about May 5, 1952, the defendants demanded, accepted and received from the plaintiff as rent for said housing accommodations for the month of April, 1952, the sum of \$2,000.00. On or about June 5, 1952, the defendants demanded, accepted and received from the plaintiff as rent for said housing accommodations for the month of May, 1952, the sum of \$2,000.00. On or about July 5, 1952, the defendants demanded, accepted and received from the plaintiff as and for rent for said housing accommodations for the month of June, 1952, the sum of \$2,433.00.

VII.

The amount by which the rent so demanded, accepted and received by the defendants from the plaintiff exceeded the maximum lawful rent for said housing accommodations was and is the sum of \$7,825.00. Three times the amount by which the rent thus demanded, accepted and received exceeded the maximum lawful rent for said housing accommodations is the sum of \$23,475.00.

Wherefore, plaintiff demands judgment against the defendants and each of them for the sum of \$23,475.00 as liquidated damages, for reasonable

attorneys' fees in prosecuting this action, for costs of suit herein, and for such other and further relief as may be just and proper.

MALONE & SULLIVAN,
/s/ WILLIAM M. MALONE,
/s/ RAYMOND L. SULLIVAN,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed August 5, 1952.

[Title of District Court and Cause.]

STIPULATION AND ORDER PERMITTING
THE FILING OF SUPPLEMENTAL COM-
PLAINT

Subject to the approval of the above-entitled Court, the parties hereto, by and through their respective counsel, hereby stipulate that the plaintiff above named may file herein his supplemental complaint in the form attached hereto.

Dated: April 2, 1953.

WILLIAM M. MALONE,
By /s/ RAYMOND L. SULLIVAN,
Attorneys for Plaintiff.

/s/ JAMES P. SHOVLIN, JR.,
ARGUELLO & GIOMETTI,
Attorneys for Defendants.

It is so ordered: May 11, 1953.

/s/ EDWARD P. MURPHY,
Judge of the United States
District Court.

[Endorsed]: Filed May 11, 1953.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

By leave of court first had and obtained, the plaintiff files this supplemental complaint herein against the defendants Oliver A. Fox, J. E. Patterson and Corey Gabrielson.

I.

On or about August 5, 1952, the defendants demanded, accepted and received from the plaintiff as rent for the housing accommodations described in the complaint on file herein the sum of \$152.00 and thereafter on or about August 11, 1952, the defendants demanded, accepted and received from the plaintiff as rent for said housing accommodations the further sum of \$1,848.00; both of said sums, in the aggregate amount of \$2,000.00, were demanded, accepted and received by the said defendants from the said plaintiff as rent for said housing accommodations for the month of July, 1952. Thereafter on or about September 12, 1952, the defendants demanded, accepted and received from the plaintiff

as rent for said housing accommodations for the month of August, 1952, the sum of \$2,145.00.

II.

The amount by which the rent so demanded, accepted and received exceeded the maximum lawful rent for said housing accommodations for the said months of July and August, 1952, was and is the sum of \$3,841.00. Three times the amount by which the rent thus demanded, accepted and received exceeded the maximum lawful rent for said housing accommodations for said period is the sum of \$11,523.00.

Wherefore, plaintiff demands judgment against the defendants and each of them for the sum of \$11,523.00 as liquidated damages, in addition to the relief demanded and prayed for in the original complaint on file herein.

MALONE & SULLIVAN,
/s/ WILLIAM M. MALONE,
/s/ RAYMOND L. SULLIVAN,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed May 11, 1953.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT AND SUPPLEMENTAL COMPLAINT

Now comes Oliver A. Fox, J. E. Patterson and Corey Gabrielson, Defendants, answering the Com-

plaint on file herein admit, deny and allege as follows:

I.

Answering paragraph I these answering Defendants admit the allegations therein contained, and further answering said paragraph I these answering Defendants allege that at all times herein mentioned, there was in full force and effect rent regulation 2, Rent Regulation 3 and Rent Regulation 4 of the Housing Rent Regulations.

II.

Answering paragraph II, these answering Defendants deny generally and specifically, each and every, all and singular, the allegations thereof.

III.

Answering paragraph III, these answering Defendants admit the allegations therein contained.

IV.

Answering paragraph IV, these answering Defendants admit the allegations therein contained and further answering said paragraph IV, these answering Defendants allege that the Plaintiff vacated the premises on the 31st day of October, 1952.

V.

Answering paragraph V, these answering Defendants deny generally and specifically, each and every, all and singular, the allegations thereof, and

further answering said paragraph V, these answering Defendants allege that said housing accommodations were not subject to rent control under the provisions of said Act or the housing rent regulations.

VI.

Answering paragraph VI, these answering Defendants deny generally and specifically, each and every, all and singular, the allegations therein contained and not specifically admitted to be true; except that these answering Defendants admit that they have received the sums therein alleged as rent.

VII.

Answering paragraph VII, these answering Defendants deny generally and specifically, each and every, all and singular, the allegations therein contained.

As and for a First, Separate and Affirmative Defense, the Defendants Allege as Follows:

I.

That the Defendants rented said premises, consisting of twenty-two (22) dwelling units and a swimming pool, to the Plaintiff by a master lease, a copy of which is attached hereto as Exhibit "A," and expressly referred to and made a part hereof.

II.

That the Plaintiff did undertake to operate and hold out the units of said motel and the facilities of said motel to the public for rent for which the Plaintiff received large sums of money.

III.

That the Defendants were informed and of the belief that the premises were not subject to rent control and at all times herein said Defendants acted in good faith.

IV.

That the master lease executed by and between the Plaintiff, and attached hereto as Exhibit "A," is not now, nor ever has been, subject to rent control.

Answering the Supplemental Complaint on file herein, the Defendants admit, deny and allege as follows:

I.

Answering paragraph I, these answering Defendants deny generally and specifically, each and every allegation therein contained and not specifically admitted to be true; except that these answering Defendants admit that they have received the sums therein alleged as rent.

II.

Answering paragraph II, these answering Defendants deny generally and specifically, each and every, all and singular, the allegations thereof.

As and for a First, Separate and Affirmative Defense to Plaintiff's Supplemental Complaint on File Herein the Defendants Allege as Follows:

I.

These answering Defendants incorporate paragraphs I, II, III and IV of their First, Separate

and Affirmative answer to Plaintiff's Complaint on file herein as fully as though set forth again.

Wherefore, Defendants pray that Plaintiff take nothing by his action and that Defendants be awarded their costs of suit and for such other and further relief as to the Court seems meet and just.

/s/ JAMES P. SHOVLIN,
Attorneys for Plaintiff.

Duly verified.

EXHIBIT A

Lease

This Lease, executed in quadruplicate at Oakland, California, this 31st day of December, 1951, by and between Oliver A. Fox, J. E. Patterson and C. Gabrielson, hereinafter collectively called "Lessor," and James B. Doyle, hereinafter called "Lessee";

Witnesseth:

Lessor hereby lets to Lessee, and Lessee hereby hires from Lessor, all of that certain real property in the County of Alameda, State of California, more particularly described in Exhibit "A," attached hereto and hereby made a part hereof, together with all fixtures, attachments and appurtenances thereto, and all of the furniture and other personal property located thereon, which said furniture and other personal property is described in the inventory marked Exhibit "B" attached hereto and hereby made a part hereof.

The Purpose for which said premises are leased

shall be only for the operation of the El Rancho Santa Rita Motel and other lawful commercial activities directly related thereto.

The Term of this lease shall be for a period of Three Years commencing on the first day of January, 1952, and ending at midnight of the 31st day of December, 1954.

The Rent to be paid by Lessee to Lessor hereunder shall be as follows, to wit:

(a) From the commencement hereof, to and including the 29th day of February, 1952, Lessee shall pay over to Lessor each month as rent under this lease, the whole amount of the gross receipts from said operation on the demised premises, less Five Hundred Dollars (\$500.00) per month only, which last mentioned sum the Lessee shall retain as the agreed upon total operating expense each month, regardless of whether said sum is more, less or the same as the actual amount of operating expense per month.

(b) From March 1, 1952, to and including September 30, 1952, Lessee shall pay over to Lessor each month as rent under this lease either the whole amount of the gross receipts from said operation on the demised premises less Five Hundred Dollars (\$500.00) per month only, exactly as provided for in paragraph (a) immediately preceding, or Two Thousand Dollars (\$2,000.00), whichever is the higher amount.

(c) From October 1, 1952, to the end of the term hereof, Lessee shall pay over to Lessor each

month as rent under this lease the sum of Three Thousand Dollars (\$3,000.00).

(d) In addition to the rental payments hereinabove provided for, Lessee is hereby required and agrees that from and after October 1, 1952, Lessee shall:

1. Pay all of the taxes and special assessments upon any and all of the demised premises, real and personal, as the same shall fall due, for and on account of the Lessor, and

2. Insure at Lessee's expense throughout the term hereof all of the demised premises, real and personal, for not less than \$40,000.00, for loss by fire, with extended coverage, loss payable to Lessor hereunder; and to provide at Lessee's expense public liability and property damage insurance coverage for and upon the demised premises and the said operation thereof in the following amounts, to wit, public liability: \$100,000.00 and \$200,000.00; property damage: \$5,000.00.

In addition to the rental and tax payments and insurance hereinabove provided for, Lessee shall pay to Lessor, concurrent with the execution hereof, the sum of One Thousand Dollars (\$1,000.00) which said sum is payed not as rent, but solely as part consideration for the execution of this lease by Lessor, the receipt whereof is hereby acknowledged by Lessor.

It Is Further Mutually Agreed by and Between
Lessor and Lessee as follows:

- (1) Lessor agrees that before June 1, 1952, un-

less prevented by act of God, or by act of any lawfully constituted government body, or by strikes or other causes beyond Lessor's control, Lessor shall, at Lessor's cost, (a) landscape the grounds of said premises in such manner as Lessor shall deem proper; (b) build a swimming pool on said premises, which said pool shall not cost Lessor more than \$5,000.00, including all charges and expenses in connection with same.

(2) Lessee shall have the option to terminate this lease at any time on or after the first day of October, 1952, by giving Lessor sixty (60) days written notice by registered mail in the manner hereinafter provided.

(3) Concurrent with the execution hereof, Lessee shall be given full possession of said premises, his possession being hereby acknowledged by Lessee.

(4) The Lessee shall not use, or permit said premises, or any part thereof, to be used, for any purpose or purposes other than the purpose or purposes for which the said premises are hereby leased; and no use shall be made or permitted to be made of the said premises, nor acts done, with Lessee's knowledge or consent or of which Lessee should reasonably have known or foreseen, which will increase the existing rate of insurance upon the building in which said premises may be located, or cause a cancellation of any insurance policy covering said building, or any part thereof, nor shall the Lessee sell, or permit to be kept, used, or sold, in or about

said premises, any article which may be prohibited by the standard form of fire insurance policies. The Lessee shall, at his sole cost and expense, comply with any and all requirements, pertaining to said premises, other than structural defects not caused by any wilful or negligent act or omission of Lessee, of any insurance organization or company, necessary for the maintenance of reasonable fire and public liability insurance, covering said building and appurtenances.

(5) The Lessee shall not commit, or suffer to be committed, any waste upon the said premises, or any public or private nuisance, or other act or thing which may be unlawful or which may be damaging to the premises or to the Motel business thereon located. The Lessee shall not make, or suffer to be made, any alterations of the premises, or any part thereof, without the written consent of the Lessor first had and obtained, and any additions to, or alterations of, the said premises shall become at once a part of the realty and belong to the Lessor.

(6) The Lessee shall not vacate or abandon the premises at any time during the term except when required to do so by governmental direction and authority; and if, except as aforesaid, the Lessee shall abandon, vacate or surrender said premises, or be dispossessed by process of law, or otherwise, any personal property belonging to the Lessee and left on the premises shall be deemed to be abandoned, at the option of the Lessor, except such property as may be mortgaged to the Lessor.

(7) The Lessee shall, at his sole cost and expense, keep and maintain the said premises and appurtenances and every part thereof, including glazing, sidewalks adjacent to the said premises, any store front and the interior of the premises, except that during the period from the commencement hereof to and including September 30, 1952, only, Lessor shall be responsible for the repair and maintenance of roof, walls and foundations, in good and sanitary order, condition and repair, hereby waiving all right to make repairs at the expense of the Lessor as provided in Section 1942 of the Civil Code of the State of California, and all rights provided for by Section 1941 of the said Civil Code. By entry hereunder the Lessee accepts the premises as being in good and sanitary order, condition and repair, and agrees on the last day of said term, or other sooner termination of this lease to surrender unto the Lessor all and singular the said premises with the said appurtenances in substantially the same condition as when received, reasonable use and wear thereof and damage by fire, act of God, or the public enemy with which the United States may be at war, or by the elements, or accident not in any way connected with the operation of any business on said premises and for which Lessee is entirely free from fault, excepted.

(8) Lessee shall keep the demised premises and the property in which the demised premises are situated, free from any liens arising out of any work performed, materials furnished, or obligations incurred by or for the account of Lessee.

(9) The Lessee shall, at his sole cost and expense, comply with all of the requirements of all Municipal, State and Federal authorities now in force, or which may hereafter be in force, pertaining to any business transacted on said premises; and, from and after October 1, 1952, Lessee shall also at his sole cost and expense, comply with all of the requirements of all said authorities now in force, or which may hereafter be in force, pertaining to the premises themselves, and shall faithfully observe in the use of the premises all Municipal ordinances and State and Federal statutes now in force or which may hereafter be in force. The judgment of any court of competent jurisdiction, or the admission of the Lessee in any action or proceeding against the Lessee, whether the Lessor be a party thereto or not, that the Lessee has violated any such ordinance or statute in the use of the premises, shall be conclusive of the fact as between the Lessor and the Lessee.

(10) The Lessee, as a material part of the consideration to be rendered to the Lessor under this lease, hereby waives all claims against the Lessor for damages to goods, wares and merchandise, in, upon or about said premises and for injuries to persons in, upon, or about said premises, from any cause (except the wilful or negligent act or omission of Lessor, its agents, servants, or its independent contractors) arising at any time, and the Lessee will hold the Lessor exempt and harmless for and on account of any damage or injury to any

person, or to the goods, wares and merchandise of any person, arising from the use of the premises by the Lessee or arising from the failure of the Lessee to keep the premises in good condition and repair, as herein provided.

(11) The Lessee, as a material part of the consideration to be rendered to the Lessor under this lease, hereby agrees that if the said premises, or any part thereof, shall be taken and condemned for public purposes by the proper authorities, the Lessee shall have no claim against the Lessor and shall not have any claim or right to any portion of the amount that may be awarded as damages or paid as a result of any such condemnation and all right of the Lessee to damages therefor, if any, are hereby assigned by the Lessee to the Lessor, except that if all of said premises are so taken and condemned between October 1, 1952, and December 31, 1954, inclusive, then Lessee shall, provided he is still occupying said premises at the time of any such condemnation and provided he has not within 60 days prior thereto given any notice of cancellation or termination of this lease and provided he has not committed or suffered to be committed any act or breach whatsoever of this lease which has not been waived by Lessor and which might give to Lessor the right to terminate this lease under the terms hereof, have the right to the entire amount of any payment or award resulting from such taking and condemnation less a flat sum to be awarded and paid to Lessor as his entire claim,

right and share, said flat sum to be fixed as follows:

(a) If condemnation occurs between October 1, 1952, and June 30, 1953, inclusive, Lessor's share shall be \$175,000.00;

(b) If condemnation occurs between July 1, 1953, and February 28, 1954, inclusive, Lessor's share shall be \$155,000.00;

(c) If condemnation occurs between March 1, 1954, and December 31, 1954, inclusive, Lessor's share shall be \$135,000.00.

(d) Regardless of when said condemnation occurs, said amounts set forth in subparagraphs (a), (b) and (c) immediately above shall be increased by the addition thereto of the whole amount of any and all costs and expenses of whatsoever kind or character incurred by Lessor in connection with condemnation proceedings.

(12) The Lessee, as a material part of the consideration to be rendered to the Lessor under this lease, hereby waives all claims against the Lessor, but not against any public body or authority, for damages sustained, if any, by reason of any street widening, street repaving, reconstruction or reducing width of sidewalks or construction of new curbs or gutters by any public authority affecting the herein demised premises.

(13) The Lessee shall not conduct, or permit to be conducted, any sale by auction on or about said premises; and Lessee shall not place or permit to be placed upon or about said premises any sign,

advertisement, notice, marquee or awning, except as hereinabove expressly provided or except as required by law or except as absolutely required as necessary business practice in connection with the proper management and operation of said motel, without the written consent of Lessor.

(14) The Lessee shall pay for all water, gas, heat, light, power, telephone service and all other service supplied in the said premises.

(15) The Lessee shall permit the Lessor and his agent, at their own risk, to enter into and upon said premises at all reasonable times for the purpose of inspecting the same or for the purpose of maintaining the said premises, or for the purpose of making repairs, alterations or additions to any portion of said premises including the erection and maintenance of such scaffolding, canopies, fences and props as may be required, or for the purpose of posting notices of non-liability for alterations, additions, or repairs; and shall permit the Lessor, at any time within thirty days prior to the expiration of this lease by termination before the expiration of the term hereof or otherwise, to place upon said premises any usual or ordinary "to let" or "to lease" or "for sale" signs.

(16) In the event of a partial destruction of the said premises during the said term, from any cause, the Lessor shall forthwith repair the same, provided such repairs can be made within sixty (60) working days under the laws and regulations of Federal, State, or County or Municipal authorities, but such

partial destruction shall in no wise annul or void this lease, except that the Lessee shall be entitled to a proportionate deduction of rent while such repairs are being made, such proportionate deduction to be based upon the extent to which the making of such repairs shall interfere with the business carried on by the Lessee in the said premises. If such repairs cannot be made in sixty (60) working days, the Lessor may, at his option, make same within a reasonable time, this lease continuing in full force and effect and the rent to be proportionately rebated as aforesaid in this paragraph provided. In the event that the Lessor does not so elect to make such repairs which cannot be made in sixty (60) working days, or such repairs cannot be made under such laws and regulations, this lease may be terminated at the option of either party. In any event Lessor shall within ten (10) days after such partial destruction occurs, notify the Lessee in writing whether Lessor intends to make said repairs (within a reasonable time extending beyond the said sixty (60) working days), and the time Lessor estimates will be required to make such repairs, and in the event said repairs cannot be made within said sixty (60) working days, or Lessor's estimate is more than sixty (60) working days, then Lessee may elect to cancel this lease and Lessee must so elect and notify Lessor in writing within ten (10) days after receipt of said notice from the said Lessor. In the event that Lessor does make such repairs, then Lessor agrees that all such repairs will be made as soon as possible. In the event said premises are

destroyed to the extent of $33\frac{1}{3}\%$ or more of the replacement cost thereof, the Lessor may elect to terminate this lease, provided that Lessor must exercise such election by delivering to Lessee written notice of Lessor's election so to do within twenty (20) days after such destruction occurs; except that in the event said premises are so destroyed (between October 1, 1952, and the end of the term hereof, inclusive) to the extent of $33\frac{1}{3}\%$ as aforesaid, then Lessee shall have the option to purchase said premises at a price equal to the option price hereinbelow set forth in paragraph 26 setting forth Lessee's option to purchase at the expiration of the full term hereof, plus a sum equal to \$2,400.00 for each month of the unexpired term hereof from the time of said destruction, less the amount of the insurance proceeds paid to Lessor for and on account of said destruction under the fire and extended coverage policies required hereunder. Lessee must exercise his option under the within paragraph by giving written notice to Lessor by registered mail of Lessee's election to exercise his said option within ten (10) days after the date of said destruction. Except as hereinabove provided, the manner of exercise of this option by Lessee, and the terms of any purchase by Lessee under the option granted in this paragraph (16) shall be the same (including down payment) as provided for in paragraph (26) hereof, except that Lessee shall not be obligated to make any down payment if and only if said insurance proceeds paid to Lessor are \$5,000.00 or more. If Lessee fails to

exercise this option within the time allowed hereinabove, or if Lessee fails in any particular to comply with any or all of the terms and conditions in connection with this option as the same are hereinabove described, then this option shall cease and terminate and have no effect whatsoever. In respect to any partial destruction which the Lessor is obligated to repair or may elect to repair under the terms of this paragraph, the provisions of Section 1932, subdivision 2, and of Section 1933, subdivision 4, of the Civil Code of the State of California are waived by Lessee. Wherever in this paragraph the words "working days" appear, the same shall mean every day except Saturdays, Sundays and official public holidays.

(17) The Lessee shall not assign this lease or any interest therein, including options to purchase, and shall not lease or underlet the said premises, or any part thereof, or any right or privilege appurtenant thereto, except rentals to occupants in the regular course of the motel business and for the purpose of maintaining in operation upon said premises a first class trailer park and a restaurant, including bar, nor permit any concessionaires to operate upon said premises, without the written consent of the Lessor first had and obtained, and a consent to one assignment or subletting shall not be construed as a consent to any subsequent assignment or subletting. Unless such written consent thereto has been so had and obtained, any assignment or transfer, or attempted assignment or transfer, of this lease or of any interest therein, or

underletting, either by voluntary or involuntary act of the Lessee or by operation of law or otherwise, shall, at the option of the Lessor, terminate this lease; and any such purported assignment, transfer, or underletting, without such consent shall be null and void. This lease shall not nor shall any interest therein, be assignable, as to the interest of the Lessee, by operation of law, without the written consent of Lessor.

(18) Either (a) the appointment of a receiver (except a receiver mentioned in paragraph 22 hereof) to take possession of all or substantially all of the assets of Lessee, or (b) a general assignment by Lessee for the benefit of creditors, or (c) any action taken or suffered by Lessee under any insolvency or bankruptcy act, and (d) any action taken by Lessee in any legal proceedings, whether initiated by Lessee or any other person, under any or all existing or future laws, State or Federal, for the assistance of debtors, shall constitute a breach of this lease.

(19) In the event of any breach of this lease by Lessee, in addition to other rights or remedies he may have, shall have the immediate right of re-entry and may remove all persons and property from the premises; such property may be removed and stored in a public warehouse or elsewhere at the cost of, and for the account of Lessee. Should Lessor elect to re-enter, as herein provided, or should he take possession pursuant to legal pro-

ceedings or pursuant to any method provided for by law, he may either terminate this lease or he may from time to time, without terminating this lease, re-let said premises or any part thereof for such term or terms (which may be for a term extending beyond the term of this lease, except that in case of any breach which may be committed by Lessee between the commencement hereof and September 30, 1952, inclusive, the term or terms of any such re-letting by Lessor shall not extend beyond September 30, 1952) and at such rental or rentals and upon such other terms and conditions as Lessor in his sole discretion may deem advisable with the right to make alterations and repairs to said premises; upon each such re-letting (a) Lessee shall be immediately liable to pay to Lessor, in addition to any indebtedness other than rent due hereunder, the cost and expenses of such re-letting and of such alterations and repairs, incurred by Lessor, and the amount, if any, by which the rent reserved in this lease for the period of such re-letting (up to but not beyond the term of this lease) exceeds the amount agreed to be paid as rent for the demised premises for such period on such re-letting; or (b) at the option of Lessor rents received by Lessor from such re-letting shall be applied: first, to the payment of any indebtedness, other than rent due hereunder from Lessee to Lessor; second, to the payment of any costs and expenses of such re-letting and of such alterations and repairs; third, to the payment of rent due and unpaid hereunder and the residue, if any, shall be

held by Lessor and applied in payment of future rent as the same may become due and payable hereunder. If Lessee has been credited with any rent to be received by such re-letting under option (a), and such rent shall not be promptly paid to Lessor by the new tenant, or if such re-letting under option (b) during any month be less than that to be paid during that month by Lessee hereunder, Lessee shall pay any such deficiency to Lessor. Such deficiency shall be calculated and paid monthly. No such re-entry or taking possession of said premises by Lessor shall be construed as an election on his part to terminate this lease unless a written notice of such intention be given to Lessee or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding any such re-letting without termination, Lessor may at any time thereafter elect to terminate this lease for such previous breach. Should Lessor at any time terminate this lease for any breach, in addition to any other remedy he may have, he may recover from Lessee all damages he may incur by reason of such breach, including the cost of recovering the premises, and including the worth at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this lease for the remainder of the stated term over the then reasonable rental value of the premises for the remainder of the stated term, all of which amounts shall be immediately due and payable from Lessee to Lessor.

(20) The voluntary or other surrender of this

lease by Lessee, or a mutual cancellation thereof, shall not work a merger and shall, at the option of Lessor, terminate all or any existing subleases or sub-tenancies, or may, at the option of Lessor, operate as an assignment to him of any or all of such subleases or subtenancies.

(21) In case suit shall be brought for an unlawful detainer of the said premises, for the recovery of any rent due under the provisions of this lease, or because of the breach of any other covenant herein contained, on the part of the Lessee to be kept or performed, the Lessee shall pay to the Lessor if Lessor prevails in such suit a reasonable attorney's fee which shall be fixed by the Court.

(22) If a receiver be appointed at the instance of the Lessor in any action arising under this lease, or otherwise, to take possession of said premises and/or to collect the rents and profits derived therefrom, the receiver may, if it be necessary or convenient in order to collect such rents and profits, conduct the business of the Lessee then being carried on in said premises, and may take possession of any personal property belonging to the Lessee and used in the conduct of such business, and may use the same in conducting such business on the premises, without compensation to the Lessee for such use.

(23) The waiver by the Lessor of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of any

subsequent breach of the same or any other term, covenant or condition herein contained.

(24) All notices, including notices of any dispute arising under the terms hereof shall be given to the Lessee in writing, personally or by depositing the same in the United States Mail, postage prepaid, and addressed to the Lessee at the address set opposite the name of Lessee at the end hereof unless Lessee has, prior thereto, notified Lessor in writing and received acknowledgment in writing of said notice of a change of address, which shall then be deemed the address of Lessee. All notices so mailed shall be conclusively deemed delivered on the date of mailing. All notices, including notice of any dispute arising under the terms hereof shall be given to the Lessor in writing, personally or by depositing the same in the United States Mail, postage prepaid, and addressed to the Lessor at the address of Lessor set opposite the name of Lessor at the end hereof unless Lessor has, prior thereto, notified Lessee in writing and received acknowledgment in writing of said notice of change of address, which shall then be deemed the address of Lessor. All notices so mailed shall be conclusively deemed delivered on the date of mailing. Notices must be sent by registered mail only where same is expressly required in this lease.

(25) The covenants and conditions herein contained shall, subject to the provisions as to assignment, apply to and bind the heirs, successors, executors, administrators and assigns of all of the par-

ties hereto; and all of the parties hereto shall be jointly and severally liable hereunder.

(26) At the end of the full term hereof, Lessee shall have the option to purchase said premises, including the furniture and other personal property included in the inventory attached hereto and marked "Exhibit B" for the sum of \$120,000.00, less a sum equal to any amount which Lessee has paid to Lessor as rent hereunder for and during the first nine months Only of the term hereof in excess of \$18,000.00. The option to purchase given to Lessee by this paragraph may be exercised by Lessee only between December 31, 1954, and January 5, 1955, inclusive, by his giving notice in writing to Lessor of his election to exercise same and concurrent therewith depositing into an escrow at the Oakland Title Insurance and Guaranty Company the sum of Five Thousand Dollars (\$5,000.00) cash as and for a down payment to Lessor, together with Lessee's note and deed of trust (Oakland Title Insurance and Guaranty Company's standard form) for the balance of the said purchase price with interest at six per cent (6%) per annum, payable in monthly installments of \$1,200.00 or more, including said interest from date of vesting, together with appropriate escrow instructions; whereupon Lessor shall be obligated to deposit in said escrow his grant deed to the premises to Lessee, together with appropriate escrow instructions, title to vest in Lessee free and clear of liens and encumbrances, subject only to current taxes prorated as of date of vesting, covenants, conditions and restrictions of record, if any, and subject to any

liens or encumbrances arising out of any work performed, materials furnished, or obligations of any kind incurred by or for the account of the Lessee. If Lessee fails to exercise this option between December 31, 1954, and January 5, 1955, or in any other way fails to comply with the terms and conditions hereof, then this option shall immediately cease and terminate and have no effect whatsoever.

(27) During the term hereof, Lessee shall keep such books and records as are usual and necessary for the proper operation of said Motel and in accordance with good business practice in similar businesses; and Lessee shall make said books and records available to Lessor for inspection and auditing by, or on behalf of Lessor at all reasonable times during business hours; and all rental payments hereunder shall be paid by Lessee to Lessor at 1456 First Avenue, Oakland 6, California (c/o Mr. J. E. Patterson) or such other place as Lessor may from time to time designate, on or before the fifth day of the month immediately following the month for which the same has accrued in accordance with the terms hereof.

(28) Lessee covenants and agrees that so long as this lease shall be in effect, he shall diligently and personally supervise and manage the operation of said premises and the Motel business located thereon, and that said business shall be in continuous, full operation during said time, except as prevented by causes or contingencies beyond Lessee's control.

(29) In the event Lessee gives notice to Lessor of his election to terminate this lease for any reason prior to the expiration of the term hereof, such notice shall also effect complete termination of and constitute Lessee's full and complete release and surrender of Lessee's option to purchase the demised premises as provided for in paragraphs (26) and (16) hereof; and if Lessee should at any time commit any breach of this lease, or if for any reason whatsoever this lease is terminated at any time, then any and all options given to Lessee under this lease shall immediately and simultaneously cease and terminate and have no effect whatsoever; and if Lessee should exercise any right given to him herein to terminate this lease by giving notice to Lessor, or if this lease should be terminated by Lessee's exercise of any option or right of any kind granted to Lessee by the terms of this lease or any other reason whatsoever, Lessee shall continue to pay rent during the entire period of his occupancy of said premises.

(30) Time is of the essence of this lease.

In Witness Whereof, the Lessor and the Lessee have executed these presents the day and year first above written.

/s/ OLIVER A. FOX,
8421 Ney Ave.,
Oakland, Calif.,

/s/ J. E. PATTERSON,
1456-1st Ave.,
Oakland 6,

/s/ C. GABRIELSON,
8415 Ney Ave.,
Oakland, Calif.,
Lessor.

/s/ JAMES B. DOYLE,
3150 San Pablo Ave.,
San Pablo, Calif.,
Lessee.

Exhibit "A"

Real Property in the Township of Pleasanton,
County of Alameda, State of California, de-
scribed as follows:

Portion of the 17.82 acre tract described in the deed from J. Smith Knapp and Anna Gross Knapp to Harold W. Grimm and Katherine I. Grimm, dated August 4, 1946, recorded September 26, 1946, in book 5998 of Official Records of Alameda County, page 68, described as follows:

Beginning at a point on the center line of the Pleasanton-Santa Rita Road, known as County Road No. 1533, distant thereon north $15^{\circ} 20' 30''$ west 1300.07 feet from the center line of Valley Avenue, or County Road No. 7091; running thence along said center line of County Road No. 1533 south $15^{\circ} 20' 30''$ east 660.31 feet; thence north $89^{\circ} 51'$ west 544.96 feet to the western line of said 17.82 acre tract; thence along the last named line north $0^{\circ} 9'$ east 615 feet to the southern line of the tract of land containing 14.48 acres, more or less, described in the deed by Spring Valley Company,

Ltd., to Amador Valley Mutual Water Company, dated June 23, 1940, recorded August 6, 1940, in book 3937 of said Official Records at page 331; thence along the last named line north $67^{\circ} 02' 10''$ east 18.36 feet to a line drawn south $97^{\circ} 51' 10''$ west from the point of beginning; thence north $87^{\circ} 51' 10''$ east 351.99 feet to the point of beginning.

Containing, excluding the portion in the street, an area of 5.94 acres, more or less.

Exhibit B

El Rancho Motel at Pleasanton—December, 1951

- 11 General Electric Kitchens—Elect. Stoves and ovens, Refrigerators, stainless steel sinks & drain boards, 22 steel dish cabinets, 11 steel sink cabinets.
- 8 Solid ash lamp step tables with glass.
- 15 Solid ash desks vanity combination.
- 2 Solid ash headboards, #601A Gillcraft.
- 10 Solid ash headboards, #601 Gillcraft.
- 14 Solid ash upholstered vanity benches.
- 2 Solid ash 3/3 bed ft. bds. hd. bds. & rails.
- 9 Solid ash 4/6 bed ft. bds. hd. bds. & rails.
- 8 Solid ash commodes (night stands).
- 8 Solid ash 4 dr. chests.
- 8 Solid ash pairs mirror brackets.
- 8 Armless stowabds. and mattresses.
- 1 18" street push broom, 54 in. handle.
- 1 12" street push broom, 54 in. handle.
- 1 18" push broom, 60 in. handle.
- 2 17" dust mops with handles.

- 1 Fiber—20 gallon garbage can & top.
- 22 Upholstered chairs.
- 60 Extra stuffed pillows.
- 3 Rolla beds & mattresses (folding beds).
- 3 Rolla beds & mattresses with plastic headboard.
- 22 Floor lamps—3-way sockets & shades.
- 26 Table lamps and shades—fancy quality.
- 14 Metal bed frames with hinges.
- 2 Small kitchen tables.
- 6 Large kitchen tables.
- 28 Upholstered kitchen chairs.
(Plastic tops & upholstering)
- 14 Mirrors—30 x 40.
- 12 Kitchen brooms.
- 3 Kitchen mops.
- 3 Red kitchen tables.
- 10 Red kitchen tables.
(Plastic tops & upholstering)
- Electric bulbs.
- 6 Single foam rubber mattresses.
- 6 Single box mattresses.
- 19 Doublefoam rubber mattresses.
- 19 Doublefoam rubber mattresses.
- 8 Mirrors—24 x 30.
- 2 Doz. kitchen towels—32 x 38.
- 24 Double spreads.
- 12 Twin size spreads.
- 30 Pr. drapes.
- 12 Spreads for stowaway beds.
- 10 Doz. Turkish towels, bath size 20 x 40.
(Short 31)
- 10 Doz. huck towels, size 16 x 32.
(Short 39)

10 Doz. wash clothes, size 12 x 12.

(Short 55)

11½ Doz. single mattress pads, size 39 x 76.

21½ Doz. double mattress pads, size 54 x 76.

45 Blankets, size 72 x 84.

(Short 1)

4 Doz. bath mats, size 20 x 30.

(Short 14)

48 Scatter rugs (reversible), size 22 x 32.

10 Doz. sheets—140 count, size 81 x 108.

(Short 24)

4 Doz. sheets—140 count, size 72 x 108.

14 Doz. pillow cases, size 42 x 36.

Main neon sign with flasher neon “Office” sign.

[Endorsed]: Filed May 14, 1953.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS UNDER RULE 36

Plaintiff James B. Doyle requests the defendants Oliver A. Fox, J. E. Patterson and Corey Gabrielson within ten days after service of this request to admit, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, that each of the following statements is true.

1. That on December 31, 1951, the plaintiff, as lessee, and the defendants, as lessors, entered into the written lease, copy of which is attached to and

made a part of the defendants' answer heretofore filed in this action.

2. That the premises which were the subject of said lease were not rented at any time prior to December 31, 1951.

3. That the first rent for said premises which were the subject of said lease was the sum of \$152.00 per month.

4. That the first rent for said premises which were the subject of said lease was for the rental period February 1, 1952, to February 29, 1952.

5. That the defendants Oliver A. Fox, J. E. Patterson and Corey Cabrielson did not file in the Area Rent Office of the Defense-Rental Area of Southern Alameda County, or elsewhere in any Area or Regional Rent Office, a rent registration statement for the said premises which were the subject of said lease.

6. That at no time prior to October 1, 1952, did the Director of Rent Stabilization, or the Area Rent Director of the Defense-Rental Area of Southern Alameda County, or any other person or persons appointed or designated by the Director of Rent Stabilization to carry out any of the duties delegated to him pursuant to the Housing and Rent Act of 1947, as amended, make or issue an order increasing or otherwise adjusting the maximum rent allowable for the said premises which were the subject of said lease.

7. That at no time prior to October 1, 1952, did

the defendants or any of them make or file any petition or application with the Area Rent Office of the Defense-Rental Area of Southern Alameda County or any other Area or Regional Rent Office to increase or adjust the maximum rent allowable for the said premises which were the subject of said lease.

Dated: July 29, 1953.

WILLIAM M. MALONE,
RAYMOND L. SULLIVAN,
/s/ W. J. DOWLING, JR.,
Attorneys for the Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 30, 1953.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS

1. The allegations of paragraph number one are admitted.
2. The allegations of paragraph number two are admitted.
3. The allegations of paragraph number 3 are denied, and in this regard it is alleged that the rent was at all times fixed and determined by the lease entered into by the parties, which said lease provided for the rental to be determined on a sliding scale monthly.

4. The allegations of paragraph number four are admitted.

5. The allegations of paragraph number five are denied.

6. The allegations of paragraph number six are admitted.

7. The allegations of paragraph number seven are admitted.

Dated: August 14, 1953.

/s/ JAMES P. SHOVLIN, JR.,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 18, 1953.

[Title of District Court and Cause.]

**AMENDMENT TO COMPLAINT TO CONFORM
TO EVIDENCE PURSUANT TO RULE
15 (b)**

Leave of court having been first obtained, the plaintiff files herewith his Amendment to Complaint to conform to the evidence.

As and for a further, separate and distinct cause of action, plaintiff alleges:

I.

Plaintiff incorporates herein by this reference, as

fully and completely as if set forth herein in full, all of the allegations contained in paragraphs I, II, III and VI of the complaint heretofore filed in the above action on August 5, 1952.

II.

At all times herein mentioned, up to and including September 30, 1952, the plaintiff was a tenant in possession of the housing accommodations described in paragraph III of said complaint filed herein on August 5, 1952.

III.

At all times herein mentioned the maximum lawful rent for said housing accommodations, pursuant to said Act and Regulations, was the gross monthly receipts from the operation of said premises as a motel less the sum of \$500; the gross receipts from the operation of said premises for the month of March, 1952, were the sum of \$944.00 and the maximum lawful rent for said month was the sum of \$444.00; the gross receipts from the operation of said premises for the month of April, 1952, were the sum of \$1,262.50 and the maximum lawful rent for said month was the sum of \$762.50; the gross receipts from the operation of said premises for the month of May, 1952, were the sum of \$2,462.00 and the maximum lawful rent for said month was the sum of \$1,962.00.

IV.

The amount by which the rent so demanded, accepted and received by the defendants from the

plaintiff exceeded the maximum lawful rent for said housing accommodations was and is the sum of \$2,831.50; three times the amount by which the rent thus demanded, accepted and received exceeded the maximum lawful rent for said housing accommodations is the sum of \$8,494.50.

Wherefore, plaintiff demands judgment against the defendants and each of them for the sum of \$8,494.50 as liquidated damages, for reasonable attorney fees in prosecuting this action, for costs of suit herein and for such other and further relief as may be just and proper.

MALONE & SULLIVAN,
/s/ RAYMOND L. SULLIVAN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 6, 1954.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER

Plaintiff, lessee of a motel situated near Pleasanton, California, seeks to recover alleged overcharges of rental from defendants, owners and lessors of the motel.

The parties negotiated a lease in December, 1951, Defendants rented their newly constructed motel, which consisted of twenty-two rental units and a swimming pool to be built within a specified period.

The units were furnished by lessors and the kitchens were fully equipped. Lessors also provided linens and were obligated to replace them. The lessee undertook duties which were largely those of a manager.

Both plaintiff and defendants understood that the individual rental units were subject to rent regulation. Plaintiff registered the rooms in January, 1952, for a maximum rental for all units of \$6,864.

Defendants believed that their master lease with plaintiff was not subject to rent control. They were so informed by Hynes & Bowser, their Oakland attorneys. Not until May of 1952, did they learn that they were required to register the premises with the Office of Rent Control. At that time they requested of the Area Rent Director that he decontrol the premises or fix a fair rental. This he sought to do under Rent Regulation 1, Section 166. The Rent Director failed to win approval of a decontrol recommendation; nor did he establish a maximum rent. The Advisory Board in Alameda County informed the Rent Director that there were no comparable housing accommodations in the area to serve as a yardstick for fixing maximum rent.

In June, 1952, defendants registered the master lease with the Office of Rent Stabilization in Hayward. For maximum rent they referred to the lease itself.

Under the terms of the master lease, plaintiff was required to pay as rental for the inaugural months of January and February of 1952, his gross receipts less \$500 to be retained by him. Thereafter

he was to pay a minimum of \$2,000 per month or his gross receipts less \$500 whichever sum was greater.

Plaintiff entered the leasehold premises upon their completion about the middle of January, 1952, and paid no rental for that month. In February, in accordance with the terms of the lease, plaintiff paid \$175 (through miscalculation this sum was \$19 higher than the amount actually owed). For the subsequent months until October, 1952, when plaintiff surrendered his lease, he paid at least \$2,000 per month regardless of gross receipts. Had the formula of gross receipts less \$500 been applicable, he would have paid considerably less than this sum in March and April when the motel was still struggling to acquire tenants.

The parties do not dispute the facts. Based on the narrative of events, plaintiff contends that he is entitled to be reimbursed for overpayment of maximum rent in the sum of at least \$2,831.50. He also contends that under a different interpretation of maximum lawful rent, he is entitled to the return of overcharges in the amount of \$11,528. Plaintiff computes this latter sum by utilizing the figure of \$175 per month as the maximum rent. This is the amount plaintiff paid for the first full month of occupancy, namely February, 1952. For the lesser figure, plaintiff uses the lease formula of gross receipts less \$500 per month throughout the term of the lease. Under this formula the legal maximum varied from month to month as the gross income for the premises gradually increased. Plaintiff suffered substan-

tial losses in March and April of 1952, when he was compelled to pay the alternative minimum of \$2,000 per month.

Plaintiff also asks for treble damages, contending that the overcharges were wilful and the result of failure to take practicable precautions against the occurrence of the violation. He points out that defendants made inquiry in December, 1951, before the premises were under control, and thereafter did nothing to ascertain the scope of the law until May, 1952. Defendants note that they not only consulted their counsel before entering into the leasehold agreement, but that they thereafter took numerous steps to have a maximum ceiling imposed by the rental authority or have the premises decontrolled in the alternative.

The record is clear that defendants took proper precautions to ascertain the law and to comply with with it. There is no basis for charging the them with a wilful violation of the rent control law.

Section 39(c) of the Rent Regulations covers a lease of an entire structure. Although previously inoperative, this section was effective at the time plaintiff's lease went into effect.

Section 93 of Rent Regulation 1 provides that the maximum rent shall be "the first rent for such accommodations after the maximum rent date . . ." Where rent is established by a lease and the provisions of the agreement call for higher rentals during the term of the lease, the lessor is entitled to petition for an adjustment under section 130.

Plaintiff contends that defendants could charge

no more than the rent fixed by the lease and collected by defendants during the first full month of occupancy under the lease rental formula, viz, gross receipts less \$500.

Defendants look to Section 166 of the Regulations for relief. This section applies in instances of a dispute between landlord and tenant as to the maximum rental. It required the Director of the rental area to fix the maximum rent after determining the facts or to apply the maximum rental imposed for comparable housing in the area. Plaintiff denies the applicability of Section 166. He points out that as a matter of fact the Director fixed no maximum rent under this section. He further points out that the section itself did not require the Director to establish such a ceiling. He observes that there was no dispute as to the facts upon which the maximum rent would be determined.

Since the Area Rent Director failed to establish a maximum under Section 166 during the period of the application of rent regulations; since the rent control law terminated before the imposition of maximum rent—which could not have been made retroactive (*Markbreiter v. Woods*, 163 F.2d 993)—defendants argue that no ceiling existed. Accordingly, they assert that there could have been no payment in excess of a maximum rent prescribed and thus there could have been no overcharge.

There is no controlling authority on this subject. In order to make applicable plaintiff's legal theory that the first rent under the lease formula for the accommodations constituted the maximum under

the terms of the regulations (Sec. 93 of Rent Regulation 1), it would be necessary for the Court to adopt, quite arbitrarily, a part of the lease, to the exclusion of the other rental provisions in the same document which was tailored to meet a specific landlord-tenant commercial relationship. Adoption of the formula requires the Court to implement the regulations and to conjecture as to their scope.

It is conceded that no rent was paid the first month. Therefore, we must look to the lease for aid and assistance. The rental provisions cannot be segmented in order to fix a maximum. (Cf. OPA interpretation MR-1 issued July 7, 1942; Revised May 13, 1943; Pike & Fischer OPA Service, Vol. 8, p. 200:1115.) This Court is in no better position than the Area Rent Control Director was when he was petitioned to make a determination. Nor has the Court factors of comparable rental conditions to look to for guidance.

The precise problem does not involve abstract legal propositions, nor can it be disposed of by the application of the principles enunciated in *United States v. McCrillis*, 200 F.2d 884.

The maximum rental not having been declared or fixed in the first instance either by administrative process or judicial sanction or decree, any action fixing a maximum rental of an amount less than that called for in the rental clause of the lease would in effect result in retroactive procedure wherein plaintiff would receive an unwarranted refund. *Rhodes v. Hanschl*, 94 F. Supp. 1009 at 1010.

Judgment may be entered for defendants upon

presentation of findings of fact and conclusions of law.

Dated: September 17, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed September 17, 1954.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED AMENDMENTS TO
DEFENDANTS' PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

James B. Doyle, the plaintiff above named, offers herewith and hereby files herein his Proposed Amendants to Defendants' Proposed Findings of Fact and Conclusions of Law, served on said plaintiff on October 1, 1954:

1. Amend finding of fact No. II, so that said finding shall read as follows:

“On December 31, 1951, the defendants, as lessors, entered into a written lease with the plaintiff, as lessee, under the terms and provisions of which the plaintiff leased from the defendants the said premises commonly known and designated as the El Rancho Santa Rita Motel, for a term of three years to commence January 1, 1952. The said premises which were the subject of said lease were not rented at any time prior to December 31, 1951. Said premises were housing accommodations.”

2. Amend findings of fact No. III, by adding thereto as follows:

“The plaintiff remained in possession of said premises as the tenant of the defendants continuously from January 14, 1952, to and until September 30, 1952.”

3. Amend finding of fact No. IV, so that said finding shall read as follows:

“Under the terms of the said lease executed by and between the defendants and the plaintiff, the plaintiff agreed to pay as rental for each of the first two months of the term—namely, for the months of January and February, 1952—the gross receipts from the plaintiff’s operation of the said premises as a motel or motor court less the sum of Five Hundred and no/100 (\$500.00) Dollars each month. Under the terms of said lease, the plaintiff agreed to pay as rental for each of the months of March through September, 1952, his gross receipts as afore-said less the sum of Five Hundred and no/100 (\$500.00) Dollars each month or the sum of Two Thousand and no/100 (\$2,000.00) Dollars, whichever was the greater amount. The plaintiff operated said premises as a motel or motor court from January 14, 1952, until September 30, 1952. In the month of January, 1952, the gross receipts from the operation of the said premises by the plaintiff were less than Five Hundred and no/100 (\$500.00) Dollars and no rent was paid for that month. In the month of February, 1952, the gross receipts from the operation of said premises by the plaintiff were Six Hundred Fifty-six and no/100 (\$656.00) Dollars and

for the month of February, 1952, the plaintiff paid to the defendants the sum of One Hundred Seventy-five and no/100 (\$175.00) Dollars as and for rent for said premises, there being a small overpayment of the rent payable under the lease arising *our* of mathematical mistake or miscalculation."

4. Strike out finding of fact No. V.
5. Strike out finding of fact No. VII.
6. Add the following Findings of Fact:

VIII.

At no time prior to October 1, 1952, did the Director of Rent Stabilization, or the Area Rent Director of the Defense-Rental Area of Southern Alameda County, or any other person or persons appointed or designated by the Director of Rent Stabilization to carry out any of the duties delegated to him pursuant to the Housing and Rent Act of 1947, as amended, make or issue an order fixing, increasing or otherwise adjusting the maximum rent allowable for the said premises which were the subject of said lease between the defendants and the plaintiff.

IX.

Under the terms and provisions of the said lease between the defendants and the plaintiff, the plaintiff, as tenant, had no power to cancel or otherwise terminate the said lease prior to October 1, 1952.

X.

All of the individual housing accommodations in the said premises so leased by the defendants to the plaintiff, consisting of individual rooms and units in a motor court or motel, were controlled housing accommodations and were subject to the provisions of Rent Regulation 2.

XI.

The gross receipts from the plaintiff's operation of the said leased premises as a motor court or motel were as follows: During the month of March, 1952, the sum of Nine Hundred Forty-four and no/100 (\$944.00) Dollars; during the month of April, 1952, the sum of One Thousand Two Hundred Sixty-two and 50/100 (\$1,262.50) Dollars; during the month of May, 1952, the sum of Two Thousand Four Hundred Sixty-two and no/100 (\$2,462.00) Dollars; during the months of June through August, 1952, gross receipts in each month were not less than Two Thousand Five Hundred and no/100 (\$2,500.00) Dollars. Within one year immediately prior to the commencement of this action the defendants demanded, accepted and received from the plaintiff as rent for the said housing accommodations leased from the defendants to the plaintiff the following sums: The sum of Two Thousand and no/100 (\$2,000.00) Dollars as and for rent for the month of March, 1952; the sum of Two Thousand and no/100 (\$2,000.00) Dollars as and for rent for the month of April, 1952; the sum of Two Thousand and no/100 (\$2,000.00) Dollars as and for rent for the month of

May, 1952; the sum of Two Thousand Four Hundred Thirty-three and no/100 (\$2,433.00) Dollars as and for rent for the month of June, 1952; the sum of Two Thousand and no/100 (\$2,000.00) Dollars as and for rent for the month of July, 1952; and the sum of Two Thousand One Hundred Forty-five and no/100 (\$2,145.00) Dollars as and for rent for the month of August, 1952.

XII.

The plaintiff has been required to employ and has employed counsel to institute, maintain and prosecute this action against the defendants. Reasonable attorney's fees are \$.

Conclusions of Law

7. Strike out defendants' proposed conclusions of law.

8. Add the following conclusions of law:

I.

The Court has jurisdiction of the subject matter of this action and the parties hereto.

II.

The housing accommodations leased by the defendants to the plaintiff under the lease hereinabove referred to in the findings of fact were controlled housing accommodations within the meaning of Rent Regulation 1 (Housing Rent Regulation) issued pursuant to the Housing and Rent Act of 1947, as amended.

III.

At all times between January 14, 1952, which was the effective date of Rent Regulation 1 (Housing Rent Regulation) as to the Southern Alameda County Defense-Rental Area, and September 30, 1952, the maximum lawful monthly rent for the said premises leased by the defendants to the plaintiff was the sum computed each month by taking the gross receipts from the plaintiff's operation of a motor court or motel on the leased premises and deducting therefrom the sum of Five Hundred and no/100 (\$500.00) Dollars; the maximum lawful rent for the said premises for the month of March, 1952, was the sum of Four Hundred Forty-four and no/100 (\$440.00) Dollars; the maximum lawful rent for the said premises for the month of April, 1952, was the sum of Seven Hundred Sixty-two and 50/100 (\$762.50) Dollars; the maximum lawful rent for the said premises for the month of May, 1952, was the sum of One Thousand Nine Hundred Sixty-two and no/100 (\$1,962.00) Dollars.

IV.

The amounts demanded, accepted and received by the defendants from the plaintiff as and for rent for said premises exceeded the maximum lawful rent for said premises as follows: For the month of March, 1952, the sum of One Thousand Five Hundred Fifty-six and no/100 (\$1,556.00) Dollars; for the month of April, 1952, the sum of One Thousand Two Hundred Thirty-seven and 50/100 (\$2,137.50)

Dollars; for the month of May, 1952, the sum of Thirty-eight and no/100 (\$38.00) Dollars.

V.

Plaintiff is entitled to recover from defendants three times the amount of single overcharges, namely, the sum of Eight Thousand Four Hundred Ninety-four and 50/100 (\$8,494.50) Dollars and, in addition thereto, reasonable attorney's fees in the amount of \$.....

These Proposed Amendments to Defendants' Proposed Findings of Fact and Conclusions of Law are offered pursuant to Rule 5(e) of the Rules of Practice of the District Court of the United States, for the Northern District of California, and pursuant to the Rules of Civil Procedure for the District Courts of the United States, and are based upon all the evidence, oral and documentary, records and files in said action.

Dated: October 6, 1954.

MALONE & SULLIVAN,
/s/ RAYMOND L. SULLIVAN,
/s/ WILLIAM J. DOWLING, JR.,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

Lodged October 6, 1954.

[Endorsed]: Filed October 6, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause coming on for trial on the 24th day of June, 1954, having been tried before the Court, William Dowling appearing as Counsel for the Plaintiff, and Marvin G. Giometti appearing as counsel for the Defendants, and after hearing the allegations and proofs of the parties, the arguments of counsel and being fully advised in the premises, the following Findings of Fact and Conclusions of Law constituting the decision of the Court in said action, are hereby made:

Findings of Fact

I.

That Defendants were the owners of certain housing accommodations in the Township of Pleasanton, County of Alameda, State of California, within the defense-rental area of Southern Alameda County, said housing accommodations were, and are, located on Santa Rita Road between the town of Pleasanton, California, and the intersection of Santa Rita Road with Highway 50 in Alameda County in California, approximately one mile from Pleasanton, California, and approximately one and one-half miles from the said intersection of Santa Rita Road with Highway 50. Said housing accommodations are, and were, commonly known and designated as the El Rancho Santa Rita Motel.

II.

That on the 31st day of December, 1951, the Defendants leased said premises to the Plaintiff.

III.

That the construction of said Motel was completed on January 14, 1952, and on said date the Plaintiff entered into physical possession of said premises.

IV.

Under the terms of the lease executed by and between Defendants and Plaintiff, Plaintiff was to pay as rental for the inaugural months of January and February of 1952, his gross receipts less Five Hundred (\$500.00) Dollars to be retained by him. Thereafter he was to pay a minimum of Two Thousand (\$2,000.00) Dollars per month or his gross receipts less Five Hundred (\$500.00) Dollars, whichever sum was greater. Plaintiff paid no rental for the month of January. In February, Plaintiff paid a rental of One Hundred Seventy-five (\$175.00) Dollars. For the subsequent months until October, 1952, at which time Plaintiff surrendered his lease, he paid at least Two Thousand (\$2,000.00) Dollars per month regardless of gross receipts.

V.

Both Plaintiff and Defendants understood that the individual rental units were subject to rent regulations. Plaintiff registered the individual rental units in January, 1952, for a maximum rental for

all units of Six Thousand Eight Hundred Sixty-four (\$6,864.00) Dollars.

VI.

In June, 1952, Defendants registered the Master Lease with the Office of Rent Stabilization in Hayward. For maximum rent they referred to the lease itself.

VII.

Defendants believed that their Master Lease with Plaintiff was not subject to rent control. Defendants did not learn that they were required to register the premises with the Office of Rent Control until May, 1952. At that time, they requested of the Area Rent Director that he decontrol the premises or fix a fair rental. This he sought to do under Rent Regulation 1, Section 166. The Rent Director failed to win approval of a decontrol recommendation and he did not establish a maximum rent. The Advisory Board in Alameda County informed the Rent Director that there were no comparable housing accommodations in the Area to serve as a yardstick for fixing maximum rent. Controls expired during this period and therefore no maximum rent was ever fixed for said premises.

Conclusions of Law

I.

The maximum rental not having been declared or fixed in the first instance either by administrative process or judicial decree, any action fixing a maximum rental of an amount less than that called for in

the rental clause of the lease would, in effect, result in retroactive procedure wherein Plaintiff would receive an unwarranted refund.

II.

That Defendants are entitled to Judgment against the Plaintiff.

III.

That Defendants are entitled to Judgment for their costs and disbursements incurred or expended herein.

Let Judgment be Entered Accordingly.

Dated: This 12th day of October, 1954.

/s/ GEORGE B. HARRIS,

Judge of the United States
District Court.

Receipt of Copy acknowledged.

Lodged October 2, 1954.

[Endorsed]: Filed October 12, 1954.

United States District Court for the Northern
District of California, Southern Division

No. 31723

JAMES B. DOYLE,

Plaintiff,

vs.

OLIVER A. FOX, J. E. PATTERSON, and
COREY GABRIELSON,

Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial before the Court sitting without a jury on the 24th day of June, 1954, Marvin G. Giometti, Esq., appeared as attorney for Defendants and William Dowling, Esq., appeared as attorney for Plaintiff, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that Judgment be entered in accordance therewith; Now, Therefore, by reason of the law and findings aforesaid:

It Is Ordered, Adjudged and Decreed:

That Plaintiff take nothing by his Complaint and supplemental complaint and that Defendants be awarded their costs herein.

Dated: This 12th day of October, 1954.

/s/ GEORGE B. HARRIS,
Judge of United States
District Court.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 12, 1954.

Entered October 13, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that James B. Doyle, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment heretfore filed and entered in this action on October 13, 1954.

Dated: November 5th, 1954.

MALONE & SULLIVAN,
/s/ RAYMOND L. SULLIVAN,
/s/ WILLIAM J. DOWLING, JR.,
Attorneys for Plaintiff,
James B. Doyle.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 8, 1954.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

Whereas, the Plaintiff in the above-entitled action is about to appeal to the United States Court of Appeals for the Ninth Judicial Circuit, from a judgment, entered against him in said action on October 13, 1954, in said United States District Court for the Northern District of California, Southern Division, in favor of the defendants in said action.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned American Surety Company of New York, a corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellant, that the appellant will pay all costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding the sum of Two Hundred Fifty (\$250.00) Dollars, to which amount it acknowledges itself bound.

In case of a breach of any condition hereof, of the above-entitled Court may, upon notice to said American Surety Company of New York, surety hereunder, of not less than ten days, proceed summarily in the above-entitled action or proceeding to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefrom against said surety and award execution therefor.

In Witness Whereof, the corporate seal and name of said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 2nd day of November, 1954.

[Seal] AMERICAN SURETY
COMPANY OF NEW YORK.

By /s/ F. E. BUCKINGHAM,
Res. Vice President.

Attest:

/s/ E. C. SCHOLZ,
Res. Asst. Secretary.

Bond No. 35-541-531.

Premium \$10.00 per annum.

State of California,
City and County of San Francisco—ss.

On this 2nd day of November in the year one thousand nine hundred and fifty-four before me, Shirley M. Conrad, Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared F. E. Buckingham and E. C. Scholz, known to me to be the Resident Vice-President and Resident Assistant Secretary respectively of the

American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] /s/ SHIRLEY M. CONRAD,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires February 23, 1958.

[Endorsed]: Filed November 8, 1954.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 31723

JAMES B. DOYLE,

Plaintiff,

vs.

OLIVER A. FOX, J. E. PATTERSON and
COREY GABRIELSON,

Defendants.

REPORTER'S TRANSCRIPT

June 24, 1954

Appearances:

For the Plaintiff:

MALONE AND SULLIVAN, by
WILLIAM J. DOWLING, JR., ESQ.

For the Defendants:

MARVIN G. GIOMETTI, ESQ.

The Court: You may proceed.

Mr. Dowling: If your Honor please, I may say by way of introductory observation that, with your Honor's permission, I think that Mr. Giometti and I can substantially agree as to what the facts are in this case and submit to your Honor ultimately possibly one or two limited facts and the issue of law, which is the important one, I think, to be resolved. Would your Honor appreciate approach to the problem along those lines?

The Court: You proceed in any fashion you wish. Any mode of presentation that you have is agreeable to me. I never try to guide the order of proof. I have enough trouble trying to guide myself most of the time.

Mr. Dowling: I might with your Honor's permission present to you briefly the picture as I see it. The case here involves the underlying master lease of motel premises which were situated in the Township of Pleasanton in Southern Alameda, the Southern Alameda Defense Rental Area. The individual units in the motel, of course, were leased out to sub-tenants by the master lessee, who is the plaintiff in this case. The underlying lease is subject to rent control, and I think the defendants are now prepared to concede that, is that not correct?

Mr. Giometti: Yes, that is correct, your Honor, subject to rent control under Section 39(c) of Rent Regulation 1. [2*]

Mr. Dowling: In that connection, for purposes of the record, and with your Honor's permission and

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

counsel's, may we introduce the lease in evidence?

Mr. Giometti: Yes.

The Court: That may be marked. That is the original lease?

Mr. Dowling: That is the original lease, if your Honor please.

(Thereupon the lease referred to was received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Dowling: Secondly, if your Honor please, I think we are in agreement as to the actual amounts which were paid as rent during the period in question. The answer on file here concedes that the defendant received the amounts alleged in the complaint and supplemental complaints. The answer does not go so far as to concede that the amounts were received for the particular housing accommodations in question, although I assume that will be conceded.

Mr. Giometti: That is correct.

Mr. Dowling: Will it also be conceded, Mr. Giometti, that they were received as rental for the monthly periods alleged?

Mr. Giometti: Yes.

Mr. Dowling: So there is no question, if your Honor please, either as to the amounts of rent which have been received by the defendant. The only question arises out of what is the [3] lawful maximum rent, if any, for these premises? It is the contention of the plaintiff that pursuant to Section 93 of the Rent Regulations for Housing, the maximum rent was the first rent for these premises, that upon the

factual basis that the premises were not rented upon the maximum rent date, which was November 1st, 1951. That is correct, is it not, Mr. Giometti?

Mr. Giometti: That is correct, yes.

Mr. Dowling: They were not rented on that date because they were still under the course of construction on that date, as a matter of fact, isn't that right?

Mr. Giometti: That is right.

Mr. Dowling: That the first rental of these premises at any time was rental reflected by the lease which is Plaintiff's No. 1 in evidence. The plaintiff contends that the maximum rent is the first rent, and that is pursuant to Section 93. Your Honor will note that the lease provides for a rental to be determined by a formula. There is a copy of the lease attached to the defendant's answer, if your Honor please.

The Court: I have it.

Mr. Dowling: And that for the first two months of the term, from the commencement of the lease, that is, January 1 of 1952 until the end of February, 1952, the lessee shall pay to the lessor as rent the whole amount of gross receipts less \$500. Subsequent to the first two-month period a new [4] formula comes into operation. Under the lease from March 1st, 1952, to and including September 30th, the lessee shall pay the gross less \$500, or \$2,000, whichever is greater. Pursuant to the provisions of the lease the plaintiff actually paid \$175 as rent in March for the month of February, 1952. Will that be conceded, Mr. Giometti?

Mr. Giometti: That that was the amount paid?

Mr. Dowling: That that was the amount paid in March for February. It is the plaintiff's contention that that is the maximum lawful rent, the first rent paid. There is a discrepancy, if your Honor please, between that figure and the figure pleaded in the complaint because of a mathematical error in computing the gross during one of those months. I will put the plaintiff on to testify to that, if you wish.

Mr. Giometti: I do not think that that is necessary.

Mr. Dowling: In the alternative it is the plaintiff's contention that the maximum lawful rent is the formula which was fixed for the months of January and February, namely, the gross less \$500.

The Court: \$500 being regarded as the——

Mr. Dowling: As the expenses of operation. I have here, if your Honor please, records of receipts kept at the motel premises by the plaintiff or by his employees. Mr. Giometti has seen these. Shall I put Mr. Doyle on to identify them?

The Court: I might take a short recess. Any other [5] documents you have you may discuss with counsel.

(Recess.)

Mr. Dowling: If your Honor please, I have in my hand a composition-type spiral ringbound book, which bears on the first page the title "Rancho Santa Rita," and which book was to be a record of the cash receipts of the sub-tenancies at the El

Rancho Santa Rita Motel for the period of January 19th to June 3rd, I believe.

It will be stipulated, I understand, that if Mr. Doyle were called to testify, he would testify that this record was kept in the usual course of the business of the Santa Rita Motel, that it was usual and ordinary for that business to keep records of the receipts from the tenants, and that the entries were made at or about the time the transactions took place. Is that correct?

Mr. Giometti: That is correct.

The Court: It may be marked.

Mr. Dowling: We offer this as plaintiff's next in order.

(Whereupon the cash receipt book referred to was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Dowling: I have also in my hand—and this is purely for the convenience of the Court and of counsel—a summary of the daily receipts as reflected by that book for the period of the months of January through May, 1952. [6]

The Court: That may be marked as a summary.

(Whereupon summary of daily receipts was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Dowling: I have only one further request of your Honor in connection with the plaintiff's case, and that is in view of the possibility that the maximum rent here may be determined to be the formula provided by the lease instead of the dollars and

cents first rent, I might ask the Court for leave to file an amendment to the complaint to conform to the evidence in that respect.

The plaintiff will rest.

Mr. Giometti: If your Honor please, it has been stipulated between counsel that the defendant's answer on page 3, paragraph 3, may be amended on its face, if that meets with the Court's approval, to add the following statement, that the overcharge, if any there was, was not willful or the result of failure to take proper precautions. May that be so amended on its face?

The Court: So ordered.

Mr. Giometti: To summarize the position of the defendants on this issue, your Honor, I might say we have here a motel of considerable value, in excess of \$100,000, which had 22 units, swimming pool, etc., and included, in addition to the motel units themselves, additional acreage outside of the units. As is indicated in this lease, a computation was made for the [7] rentals. In other words, the first two months were the take of the motel less the sum of \$500. After that there was a certain fixed sum, as the lease will indicate.

It has been the contention of plaintiff, as announced here, that their position was that under Section 93 of Rent Regulation No. 1 the first rent paid was the rental for the premises, and therefore, instead of the rent as provided by the lease, the maximum rent established for those premises is the sum either of \$175 for the entire term of this lease, or the formula computation as they have indicated.

It is the contention of the defendant here that under the regulations we concede, first of all, that the premises are subject to control under 39(c), so that your Honor will not have to go into that. It applies in a very technical period. In other words, if this lease had been entered into on January 15th, the underlying lease would not have been subject to control. So it is a sort of freak situation where the premises themselves, because they were constructed within a certain period of time, and because leased within this two and a half month period they happen to fit under control. If they had not been leased or finished construction in any other period of time they would not have been under control.

So far as the rental itself is concerned, 39(c) provides that it is subject to control. That we concede. The regulations themselves provide, your Honor, under Section 166 of [8] Rent Regulation No. 1, that where the rent is not known, then it is incumbent upon the director to determine a maximum rent, and under the stipulations if the maximum rate is not established, then we have no maximum rent and, accordingly, then there would be no case as far as the plaintiff is concerned, because there is no provision under the regulation to go back to make retroactive a maximum rent.

So the position, then, briefly, of the defendants in this issue is that no maximum rent was ever

established, and that under Section 166 of Rent Regulation No. 1, that the rent was in doubt because of the terms of the lease, and accordingly there is no maximum rent. That is basically the position of the defendants in this issue, your Honor, so far as the law is concerned.

In addition thereto, I have certain documents here which were received from the General Services Administration, a couple of letters in here that went to the Regional Board, the rent registration of the landlord that was filed June 9th, 1952, and the rent registrations that were filed on the individual units by the plaintiff in this case. The stipulation between myself and Mr. Dowling in this respect is that Mr. Dowling waives any formal objection except as to the relevancy of this material.

Mr. Dowling: Our position is this, if your Honor please: the documents are incompetent, irrelevant and immaterial to [9] bear upon the question of what the lawful maximum rent was. I think they might very well be material with reference to the issue of the Chandler defense. I have no objection to their being admitted for that purpose. I do object to their admissibility for any purpose that would tend to have any bearing on the establishment of the maximum rent.

The Court: That may be marked.

(Whereupon the material referred to was received in evidence and marked Defendant's Exhibit A.)

Mr. Giometti: If your Honor please, at this time I would like to call to the stand Mr. Oliver Fox.

OLIVER A. FOX

one of the defendants herein, was called on behalf of the defendants, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court.

A. Oliver Fox. I live at 8421 Ney Avenue, Oakland, and I do maintenance work at the motel.

Direct Examination

By Mr. Giometti:

Q. Mr. Fox, are you one of the owners of the El Rancho Motel, Pleasanton, California?

A. Yes. [10]

Q. That is the motel that is the subject of this present controversy, is that correct? A. Yes.

Q. Were you the owner of that motel or one of the owners of that motel on January 1st, 1952?

A. Yes.

Q. Who were the other owners of that motel?

A. Mr. Corey Gabrielson and J. E. Patterson.

Q. Would you describe that motel to the Court, please?

Mr. Dowling: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Dowling: To any issue now pending before the Court.

(Testimony of Oliver A. Fox.)

The Court: Overruled. I would like to have a description of the motel.

A. Twenty-two unit motel, built in a U shape with a swimming pool in the center, first class construction and quality throughout.

The Court: Twenty-two units?

A. Yes, your Honor.

Q. (By Mr. Giometti): Can you describe the individual units to the Court, Mr. Fox?

A. You mean the size of them? How do you mean?

Q. Rooms, etc.

A. In the single rooms it is one large room with a full tile [11] bath. It has asphalt tile on the floor.

Q. How many single rooms are there?

A. There are 11.

Q. Do you have multiple units?

A. There are three that have two-room units, and the second room in the three consists of a kitchen, an all-General Electric kitchen, electric stove, refrigerator, and bedroom would be the same as the single rooms, and then there are eight three-room units, two bedrooms and kitchen.

Q. Will you describe the swimming pool, Mr. Fox?

A. It was built according to the Health Department, 22 feet wide by 60 feet long with a filter system to take care of it.

Q. Is there anything else on the premises?

A. No, that is about all.

Q. At the time of this lease the premises were furnished, is that correct?

(Testimony of Oliver A. Fox.)

A. At the time the lease was drawn I do not think the furniture was in, but it was put in shortly afterwards.

Q. You supplied the furniture to the lessee, and that description of furniture is attached to the lease which is in evidence, your Honor, and the furnishings included also linens, is that correct?

A. Yes, sir.

Q. Mr. Fox, when did you first receive any rental on the premises or on the El Rancho Motel from Mr. Doyle? [12]

A. About February 8th or 9th, I believe. I am not positive on the exact date, but I believe you have it in your records there.

Q. Let me ask you this, Mr. Fox: Did you receive any rental from Mr. Doyle for the month of January? A. No, sir.

Q. Did you receive some rentals for the month of February?

The Court: When did they go into possession?

Mr. Giometti: January 1st, your Honor.

The Court: 1953?

Mr. Giometti: That is correct, your Honor.

Q. Did you receive some rental then in the month of February? A. Yes, sir.

Q. You likewise received rental throughout the period in dispute here, is that correct?

A. Yes, sir, for the first eight months.

Q. That is correct, but you did not receive anything for the month of January? A. No, sir.

(Testimony of Oliver A. Fox.)

Q. Mr. Fox, at the time that you entered into this lease with the plaintiff, Mr. Doyle, were you aware as to whether or not these premises were subject to rent control?

A. We were aware that the rooms were subject to rent control, but we were told by the OPS rent director in Hayward that the lease was not under control. [13]

Q. In other words, at the time of the execution of this lease you did not know that the premises were subject to rent control, is that correct?

A. That is right.

Q. Can you advise the Court as to the date when you made the inquiry referred to of the Hayward Rent office as to the control of the master lease?

A. Could I refer to a piece of paper here? I have that date written down, I think. It was around in May, May 9th, if I am not mistaken.

Q. Did you ever have any conversation prior to that time? A. With the Rent Office?

Q. That is correct, in Hayward.

A. Yes, before the lease was written.

Q. When was that?

A. It would be the latter part of December.

Q. Of what year? A. 1951.

Q. What were you informed at that time?

A. That there was not any control.

Q. Of whom did you make that inquiry?

A. Well, the girl—Mr. Gabrielson is the one that actually did the phoning on that and the girl at the desk inquired and told him.

(Testimony of Oliver A. Fox.)

Q. Did you employ an attorney to assist you in drafting the [14] lease, Mr. Fox?

A. Yes, sir.

Q. Between you, Mr. Gabrielson, Mr. Patterson and Mr. Doyle? A. Yes, sir.

Q. Who was that attorney, Mr. Fox?

A. Mr. Bowser of Hynes and Bowser in Oakland.

Q. What date did you say that you employed him to perform those services for you?

A. Approximately September 15th.

Q. Of what year? A. 1951.

Q. Did you ever get together with Mr. Bowser to discuss this lease on this subject in December, 1951?

A. On several occasions.

Q. Take the first occasion. I take it that was in December, 1951? A. That is right.

Q. And who was present at that time?

A. Well, Mr. Gabrielson, Mr. Patterson, myself, Mr. Bowser, and his associate—right now his name slips my mind—and they advised us at that time, Mr. Bowser did, that they had checked with the Rent Control Office and there was no control over the lease.

Q. When did you first learn, Mr. Fox, that these premises were subject to rent control? [15]

A. Well, we actually never did learn that they were subject to rent control. We heard about Mr. Doyle threatening us on several occasions.

The Court: When in point of time, the first oc-

(Testimony of Oliver A. Fox.)

casion? A. Around April and the 1st of May.

Q. 1952?

A. Right, yes, your Honor. So we went to check with the Rent Control office again, and at that time he told us the lease was not under control, that Mr. Doyle had been in to see him several times, telling him that it was under control, that Mr. Hyne told us that, as far as they could figure out, it was not under control, but he advised us that we should file an OPS form in case they ever were under control, that we would have that on record.

Q. Did you file such a form?

A. Yes, that was filed around the 1st of May.

Q. Did you ever request at this time the Hayward Rent Office to establish a maximum rent on those premises?

A. We requested at that time for them to do it, and also twice after that, and they told us that it was too complicated for them, that they had referred the matter to San Francisco, and that they were in no position whatsoever to put a maximum rent on the place. And we also went to see Mr. Goldbaum, who is the head of the Rent Office in San Francisco, and he also told us that it was too complicated for him and that he had [16] referred it to Washington.

Q. To your knowledge, was any maximum rent ever established on the premises?

A. No, there was never any maximum rent set, although we asked them several times, and when we filed our application, and later we asked Mr. Hyne,

(Testimony of Oliver A. Fox.)

the head of the Rent Office in Hayward, what we should do about the rent, and he said by all means go ahead and collect it, the \$2000 a month or whatever the rent came to——

The Court: Pardon me. Will you go back a second. I missed part of that answer.

Q. You received \$2000, and what was that?

A. Mr. Hyne told us to collect the rent called for under the lease.

Q. You submitted the lease to him?

A. Yes, your Honor, because he said if there was any rent control later on, it could be adjusted then. But he said as far as he could ascertain, there would never be any rent control, and his office refused to set the rent control on it, or the maximum rent.

Q. (By Mr. Giometti): Showing you this photograph, will you tell the Court what that photograph is, Mr. Fox?

A. It is an aerial photograph of the motel about four months after—well, it would be around in February or March.

Q. Of what year? [17] A. 1952.

Q. Are you certain of that date?

A. Yes, this would be in 1952. Excuse me. 1953.

Q. Referring to this photograph, may I ask you this question: Does this represent the premises as they were at the time the premises were leased to Mr. Doyle?

A. Not quite. The swimming pool was not put in until June, and the back section here was an addition that we started in 1953, the early part of 1953.

Q. Other than that, that represents accurately

(Testimony of Oliver A. Fox.)

the premises as they were at the time that they were leased to Mr. Doyle, is that correct?

A. Yes, the swimming pool was not in, nor the lawn around the swimming pool. Outside of that it is almost the same.

Mr. Giometti: I would like to offer this in evidence.

The Court: It may be marked.

(Whereupon the photograph referred to was received in evidence and marked Defendant's Exhibit B.)

Mr. Giometti: I have no further questions. Thank you.

Cross-Examination

By Mr. Dowling:

Q. Mr. Fox, directing your attention to this photograph, which is Defendant's Exhibit B in evidence, you have already testified, I believe, that these rear buildings were not there? [18]

A. That is right.

Q. As a matter of fact, his tenancy terminated on the 1st of October, 1952, so that will be clear?

A. Right.

Q. The swimming pool went in, according to your recollection, some time late in June?

A. I think it was finished around the 1st of July.

Q. Actually it was well into July before it was usable, isn't that correct?

A. No, I am sure the water was in by the 4th of July. That I know for sure.

(Testimony of Oliver A. Fox.)

Q. The place was not landscaped by that time, was it?

A. The lawn was in the process of being planted at that time.

Q. It was covered by sawdust and other agents to keep it moist? A. Shavings, yes.

Q. The driveway appears to be paved in that photograph. It was not paved at any time while Doyle was in occupancy, was it?

A. It was paved in September when he was still in occupancy.

Q. Shortly before he terminated his tenancy?

A. Yes.

Q. In response to one of Mr. Giometti's questions you said a few minutes ago that no maximum rent was ever set on this property. What you meant, I assume, Mr. Fox, was that the Area Rent Director never made an order fixing the maximum rent, [19] is that what you meant to say?

A. No, they refused to set a maximum rent.

Q. That is correct, is it not, the Area Rent Director never made an order fixing the maximum rent for these premises?

A. Would that be the Hayward office, the Area Rent Director?

Q. The Area Rent Director at Hayward or any other office of the Office of Price Stabilization.

A. That is right, they refused to set an amount.

Q. So no order fixing rent for these premises was ever made by the Rent Director at Hayward.

(Testimony of Oliver A. Fox.)

to your knowledge? A. That is right.

Q. So far as you know, no such order was made by any other official of the Office of Rent Stabilization? A. That is right.

Q. So that no order fixing rent was made pursuant to the provisions of Section 166 that Mr. Giometti has mentioned here in court; that is correct, is it not?

A. Would you repeat that question?

Q. I will withdraw it, Mr. Fox. When this lease was signed, that was on the date it bears, was it, December 31st, 1951? A. Yes, sir.

Q. The term of the lease started January 1st, 1952, is that correct? A. Right.

Q. Actually the tenant did not go into occupancy until some [20] time beyond the middle of January; that is correct, too, isn't it?

A. The motel was not open until around the 21st.

Q. Around the 20th of January—19th or 20th. That furniture was not even in on January 1st, was it?

A. It may not have been in the rooms but it was there at the time.

Q. At the time that this lease was signed, or let us go back to the time when you were discussing it with Mr. Bowser, around the middle of December; you made some inquiries at that time, did you, and found that the rooms were under control?

A. Mr. Gabrielson talked to the Rent Office and we were advised at that time—now—that the rooms

(Testimony of Oliver A. Fox.)

were under control or going to be under control. I am not positive which that was. Mr. Doyle told us that he had all the connections with the Rent Control office and that he would take care of listing it with the OPS. And that was one of the main reasons he wanted a lease drawn up and ready for him to take over before the place was finished, so that he could take care of all the OPA regulations.

Q. Did you have any conversations with Mr. Bowser around the middle of December in connection with whether or not this master lease would be subject to rent control? A. Yes, sir.

Q. At the time that you had those conversations with Mr. [21] Bowser were you advised by him that the individual rooms were subject to rent control at that time?

A. He told us that—I'm not positive whether we discussed the individual rooms, but we thought they were under control or going to be under control on the individuals rooms, but he advised us that the master lease was not under control.

Q. You do not have any recollection, though, as to whether he advised you with reference to the individual rooms?

A. No, I can't say for sure that we had, but I know we talked about it.

Q. When did you first talk to Mr. Hyne?

A. My first conversation with Mr. Hyne was around the 1st of May, I believe.

Q. Mr. Hyne was the Area Rent Director of the Hayward Office, was he not?

(Testimony of Oliver A. Fox.)

A. On the 1st of June was my first conversation, around the 1st of June.

Q. May I see that paper that you are using, Mr. Fox?

A. Sure. (Handing document to Mr. Dowling.)

Q. Prior to June did Mr. Gabrielson have any conversations with Mr. Hyne in your presence?

A. No, sir.

Q. So that as far as you are concerned personally, you did not have any conversations with anybody about whether or not the master lease was subject to control between some time in [22] mid-December, when you talked to Mr. Bowser, and the 1st of June, when you talked to Mr. Hyne, is that correct?

A. Would you repeat that question?

(Question read.)

A. No, we talked it over between ourselves, Gabrielson and Patterson and myself and Mr. Bowser, the attorney.

Q. You had further conversations with Mr. Bowser after the middle of December and before the 1st of June?

A. Between the middle of December and the end of December, when the lease was consummated.

Q. What about between the end of December, or, say, the 1st of January, 1952, and June 1st, 1952: Did you have any conversations with Mr. Bowser about whether the master lease was subject to control?

A. No, sir.

Q. So you personally then had no conversa-

(Testimony of Oliver A. Fox.)

tions with anybody except your co-defendants and co-owners? A. That is right.

Q. You did not make any inquiries of the Rent Office before the 1st of June, you yourself?

A. No, it was around the 1st of June or the last of May.

Q. The last of May or the 1st of June?

A. Before we inquired again.

Q. Is it your recollection that Mr. Hyne told you that he did not know whether this place was subject to control or not? [23]

A. Well, he said that it was not controlled at that time, but then later on Mr. Goldbaum in San Francisco either talked to him on the telephone or wrote him a letter, I am not sure which, about some section in the book about where this might be under control. That would be prior to June 9th, when we filed the OPA regulation form.

Q. So that by the time that you filed that rent registration form you were advised that the master lease was subject to control, is that right?

A. No, we were advised that it was not, but he had told us that we had better fill it out, just to have it on record, but at no time were we advised by either Mr. Hyne, Mr. Goldbaum, or our attorney that the place was ever under control.

Q. You knew, of course, that if the master lease was not subject to control under the rent regulations you did not have to file a rent registration statement; you knew that, didn't you?

A. No, I did not know it, no.

(Testimony of Oliver A. Fox.)

Q. Were you under the impression in May or June, 1952, that you had to file a rent registration statement for premises which were not subject to control? A. Repeat that question.

(Question read.)

A. No, we were not under the impression that we had to file one, but Mr. Hyne suggested that we file one at that time in [24] case the place ever was under control later on.

Q. It is your testimony, then, that Mr. Hyne told you that even though it was not under control, you should file a rent registration statement?

A. Well, that was after this controversy came up about whether it was under control or whether it was not under control. He said it was not—to his knowledge it was not under control, but he said being as this has come up, we had better file a rent registration.

Q. Was that in May, 1952?

A. Yes, I believe it was in May.

Q. So that in May, 1952, Mr. Hyne did not tell you that it was not subject to control, did he? He told you that it might be subject to control?

A. Well, he didn't say that it might be. He said that to his knowledge it was not, but he said they were waiting for some ruling from Washington to find out whether the place was under control or whether it was not under control.

Q. Despite the fact that it was not under control,

(Testimony of Oliver A. Fox.)

that nevertheless you should file a rent registration statement? A. Yes, on his advice.

Q. How many conversations did you have with Mr. Hyne about this—you personally now?

A. Two or three.

Q. Where did those conversations take [25] place? A. In his office in Hayward.

Q. Who was present on the occasion of the first one? A. Mr. Gabrielson.

Q. And yourself? A. And myself.

Q. And Mr. Hyne? A. That is right.

Q. Just the three of you. When did that take place? A. Around the 1st of May.

Q. Of 1952? A. Yes.

Q. What prompted you to go to Mr. Hyne at that time? Did Doyle tell you that he felt the master lease was under control?

A. No, he never at any time told us anything about it, but we found—Mr. Gabrielson happened to be working in the office of one of the board directors and he told them there was some controversy over the motel, and that is the reason that we went down to file.

Q. The matter of whether this master lease was under control had not been discussed since the end of December, 1951. You had not, and neither had Mr. Gabrielson or Mr. Patterson, to your knowledge, made any inquiries of the Rent Director prior to May 1 as to whether the master lease was subject to control? A. That is right, we did not.

(Testimony of Oliver A. Fox.)

Q. You just did not give it a thought up to that time? [26]

A. That is right. We had already checked. They said it was not, and so we didn't check on it any further.

I might also mention in here, in March, April and May, during those months, that Mr. Doyle made many threats about us playing ball with him about the rent.

The Court: What did you say?

A. Mr. Doyle made many threats about our playing ball with him about the rent. He said if we didn't, we would regret it. They knew something that we didn't know.

Q. What do you mean by "play ball"?

A. He wanted us to cut the rent down.

Q. When?

A. During March, April and May is when he suggested it many times and made many threats toward us.

Q. He said that he had information that bore upon the matter?

A. We didn't know exactly what he was talking about. We thought he was talking about Camp Parks closing up, but evidently he was talking about the rent, as we found out shortly afterwards when he filed this complaint.

Mr. Dowling: If your Honor please, I do not like to make numerous objections in the course of interrogation of this sort. I would like to ask that

(Testimony of Oliver A. Fox.)

those last remarks go out as not responsive to any question.

The Court: They may go out.

Mr. Dowling: My principal objection is actually this [27] matter of threats is so vague I do not want to take the time of the Court in cross-examining him about it and bringing out the truth, that is all.

I have no further questions.

Redirect Examination

By Mr. Giometti:

Q. I just have one or two questions which were brought out by Mr. Dowling. You stated that the premises were not completed at the time the lease was entered into between you as a landlord and Mr. Doyle as a tenant, at that time, on December 31st, is that correct? A. That is correct.

Q. Did you have a conversation with Mr. Doyle about that time or that period about the completion of the premises?

A. You mean about when they were going to be completed?

Q. Yes.

A. Well, on finishing up a project, we did not know exactly when they would be completed, but we told them we would finish them up as soon as possible. We were completely through by February 15th, when we finished the place up and had everything hauled away and cleaned up.

(Testimony of Oliver A. Fox.)

Q. You told Mr. Doyle then, I take it, that you would not be finished in January, is that correct?

A. No, we didn't tell him we would not be finished in January. That was one of the main things on the first two months' rent, [28] because we didn't know exactly when we would have to be completed, but we told him we would finish it up just as soon as possible, and we would have it completed before March 1st.

Q. Did you have any conversation with Mr. Doyle as to why this lease should be entered into on December 31st?

Mr. Dowling: I am going to object to that as incompetent, irrelevant and immaterial. I can't see what the purpose of this line of inquiry is, your Honor.

Mr. Giometti: The point is simply this: In cross-examination Mr. Dowling raised the question and left the innuendo with the Court that these premises were leased and they were not completed, so the rent would be small, etc., and Mr. Doyle would be taking something not his full measure. I want to bring out and clarify the issue as to why these premises were rented at the time when they were not in a completed stage.

Mr. Dowling: As a matter of fact, if your Honor please, under the lease they had no obligation to complete the swimming pool until the first of June. There is no quarrel about that.

Mr. Giometti: No, I'm not talking about the

(Testimony of Oliver A. Fox.)

swimming pool. I am talking about the premises themselves.

The Witness: The main reason was because of tax purposes, that Mr. Doyle could take a loss on a certain piece of property with taxes. That was the same reason. And also he wanted the lease signed up so that he could get everything ready, register [29] with the OPA, and take care of everything before the place was actually finished so he would be free to operate when it was finished.

Mr. Giometti: I have no further questions.

Mr. Dowling: No further questions.

The Court: We might take the noon adjournment and resume at two o'clock. How many witnesses do you intend to call?

Mr. Giometti: I have two witnesses. I have Mr. Gabrielson, who can testify to many of the things that would be the same as Mr. Fox testified to. I would like to use him for just a couple of questions which are somewhat different, and then Mr. Rhodes, to verify a couple of factors. That is all. It will be very short, your Honor.

The Court: You will complete the case this afternoon?

Mr. Giometti: Yes, your Honor.

The Court: What was the first rental paid? \$175?

Mr. Dowling: The first rental paid was February.

Mr. Giometti: So we will clarify that, supplying the formula called for in the lease, no money was

paid for the month of January, the gross receipts being less than \$500. Applying the formula provided for in the lease, the sum of \$175 was paid for the month of February, that being the first money actually paid, the gross receipts being approximately \$675 less the \$500.

The Court: We will resume at two o'clock. [30]

Afternoon Session, June 24, 1954—2:00 P.M.

CORWIN GABRIELSON

called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court.

A. My name is Corwin Gabrielson, 8415 Ney Avenue, Oakland. My occupation is title insurance.

Direct Examination

By Mr. Giometti:

Q. Mr. Gabrielson, you stated that your occupation was that of title insurance. Will you tell us what your occupation was at the time of the execution of the lease with Mr. Doyle?

A. I was in the title insurance business with the Oakland Title Insurance Company.

Q. That was your main occupation at that time?

A. Yes.

Q. Are you one of the owners of the motel at

(Testimony of Corwin Gabrielson.)

Pleasanton? A. Yes.

Q. Mr. Gabrielson, prior to the execution of the lease with Mr. Doyle, did you ever have any conversation with him relative to the subject of rent control on the motel?

A. Yes. In fact, I think that is one of the reasons that we [31] leased it to Mr. Doyle.

Q. Just a moment. You say you had such a conversation? A. Yes.

Q. Will you tell us where the conversation took place?

A. Well, at the motel itself, at the motel grounds, and also Mr. Doyle has a motel, Green Acre Motel on MacArthur Boulevard, in his offices.

Q. Are you saying that there was more than one of such conversations, then? A. Yes.

Q. And one of the conversations took place at the motel in Pleasanton?

A. It might have been one or two. There might have been more.

Q. The other took place at Mr. Doyle's motel at Green Acre, is that correct? A. Yes.

Q. Will you tell the Court who was present at the time of those conversations?

A. At one conversation at the motel I know I was present. I do not recall whether Patterson and Fox were, but at the Green Acre we all were present, Mr. Doyle, his wife, myself, Fox and Patterson.

Q. Will you tell us what the subject of that conversation was, Mr. Gabrielson?

A. It was more or less while we were negotiating

(Testimony of Corwin Gabrielson.)

the lease. [32] Mr. Doyle had convinced us that he was very experienced in motel operation and that he knew all the ins and outs of rent regulation, and so forth, which we knew little of. Therefore it would be to our advantage to lease it to him rather than look around any further.

Q. Did he tell you that he had operated motels in the past? A. Yes.

Q. Did he tell you how many motels he had operated in the past?

A. I believe he had had two under operation at that time and was going to try and accumulate a chain of motels.

Q. Mr. Gabrielson, did you at any time know that the Motel Pleasanton was subject to rent control?

A. Not at any time until after the action was filed.

Q. Did you ever have a conversation with a Mr. Bowser relative to rent control?

The Court: With whom?

Mr. Giometti: Mr. Bowser.

The Court: The lawyer?

Mr. Giometti: The attorney, yes.

The Witness: Will you repeat that?

Q. (By Mr. Giometti): Did you ever have a conversation with Mr. Bowser pertaining to the control of these premises? A. Yes, yes.

Q. Where did that conversation take place? [33]

A. In Mr. Bowser's office.

Q. When?

(Testimony of Corwin Gabrielson.)

A. Some time in December while we were negotiating the lease.

Q. Who was present at that time?

A. Mr. Bowser, Mr. Broun, myself, Patterson and Fox.

Q. Did you question Mr. Bowser at that time as to whether or not the premises were subject to rent control?

A. Yes.

Q. Did he advise you on that subject?

A. Yes, he advised us it was not under control.

Q. Did you ever make any other inquiry as to whether or not these premises were subject to control, Mr. Gabrielson?

A. Yes.

Q. With whom or of whom?

A. Nobody but an attorney.

Q. With what attorney, Mr. Gabrielson?

A. Just with Broun and Mr. Bowser, and I can't think — I also consulted another attorney in my office. See, we had quite a few attorneys coming into the office at the Oakland Title.

Q. Did you ever make any inquiry of the Office of Rent Stabilization as to whether or not these premises were subject to control?

A. I can't recall.

Q. Did you ever make any inquiry of a member of the Rent Advisory Board? [34]

A. Did I ever?

Q. Yes.

A. Oh, yes, but that was not maybe in June, not while the lease was being negotiated, but later.

Q. Let us take this June date. Of whom did you

(Testimony of Corwin Gabrielson.)

make the inquiry at that time as to whether these premises were subject to control?

A. Mr. Hyne.

Q. Where did that take place?

A. In Mr. Hyne's office.

Q. Where is Mr. Hyne's office?

A. In the Hayward area rent control office.

Q. Who was present at that time, Mr. Gabrielson?

A. Mr. Fox, myself and Mr. Hyne.

Q. Were you advised at that time as to whether or not the premises were under control?

A. We were advised that they were quite sure they were not under regulation.

Q. At that time did you ask them, "Did you file a registration of those premises for the master lease"?

A. We were advised to. Just prior to that, if it is not getting off the subject, Mr. Doyle had gotten me aside three or four different times and told me that if I did not get the partners to reduce the rent, he knew something that I didn't know, and we would be awful sorry we didn't. Therefore when we [35] went in there, we asked him if we should not collect the rent for fear we would be in trouble if we did, and he advised us by all means to collect the rent, because they were quite sure we were not controlled.

Q. Who so advised you?

A. Mr. Hyne.

Q. What was Mr. Hyne's function?

A. I think he was chief of that Rent Control Board in that area.

(Testimony of Corwin Gabrielson.)

Q. In addition to your conversation with Mr. Hyne did you make any inquiry of anyone else in an official capacity with the Office of Rent Stabilization as to whether or not this master lease was subject to rent control?

A. Yes. Then we came over, I think in July, to Mr. Goldbaum's office and sat in his office for an hour or so discussing it with him, and apparently it was in Washington then being decided, and he said he could not give us any answer until he got an answer himself from Washington.

Q. Who was present at that conversation?

A. I believe Mr. Fox, Mr. Patterson and myself were present. I know Mr. Patterson and myself were present.

Q. In addition to your conversations with Mr. Hyne and with Mr. Goldbaum, did you have any other conversation with anyone else in an official capacity as to whether or not these premises or the master lease were subject to control? [36]

A. Yes, I consulted with Gene Rhodes, an attorney in Castro Valley, and he had done legal work for me before, and he was on the Rent Control Board also, and I consulted with him and he looked up the minutes of the Board and advised me that he did not think they were under control.

Q. I show you this document. Will you tell us what that is?

A. I think that is the minutes of the Board. Yes, I know it is.

(Testimony of Corwin Gabrielson.)

Q. Those are the minutes of the Rent Advisory Board? A. Yes.

Q. As a result of your inquiry of Mr. Rhodes, did you receive that document from Mr. Rhodes?

A. Mr. Rhodes handed me a copy of this document. Whether this happens to be the same copy I do not know.

Q. The contents are the same as what he gave you? A. I am sure they are.

Q. And you received this from Mr. Rhodes in July as a result of your inquiry, is that correct?

A. Yes.

Mr. Giometti: I would like to offer this in evidence.

The Court: It may be marked.

Mr. Dowling: If your Honor please——

The Court: Mark it for identification temporarily.

(The document referred to above was thereupon marked Defendant's Exhibit C for [37] identification.)

Mr. Giometti: I have no further questions of this witness, your Honor.

Cross-Examination

By Mr. Dowling:

Q. Mr. Gabrielson, your first conversation with anybody about whether or not these premises were under rent control was with Mr. Bowser around the middle of December, was it?

(Testimony of Corwin Gabrielson.)

A. Yes, I believe that is correct.

Q. At that time you recall there was a conversation with Mr. Bowser, at which time he said that the individual rooms were subject to rent control but the master lease was not, is that correct?

A. That is correct.

Q. At or about the same time, although possibly not in the same conversation, Doyle told you that he operated other places, other motels, and he was familiar with the rent control regulations, that he knew what he should do to take care of registering those individual rooms, is that right?

A. I assumed that he meant all registrations which should be made in connection with a motel in a controlled area.

Q. He told you that he would take care of registering his units there, did he? A. Yes.

Q. He told you that he was familiar with those matters because he had other motel properties, is that correct? [38] A. Yes.

Q. And this was in the period of December, 1951, at the time you were negotiating the lease and prior to its execution, is that right?

A. Yes.

Q. Mr. Gabrielson, would your answer be any different if you knew that the order which placed this area under rent control was not promulgated until the 12th of January? A. No.

Q. It would not be any different? A. No.

Q. Your answer would not be any different if I were to tell you that these premises were not under

(Testimony of Corwin Gabrielson.)

control, neither the individual units nor the premises, in the middle of December, 1951?

A. No, because we never did know. Mr. Doyle had just explained he had motels, and so forth, which were under control, and so forth, and we hadn't the slightest idea. That is the reason, I think—that would be my reason for negotiating with Mr. Doyle, was because we figured he was an experienced operator. I almost convinced the other fellows through my suggestion that we lease it to Mr. Doyle.

Q. You were with the Oakland Title Insurance Company then? A. Yes.

Q. In what capacity? [39]

A. Escrow officer.

Q. How many years were you an escrow officer?

A. About seven years.

Q. Throughout that seven-year period you dealt as an escrow officer with many properties that were subject to rent control, didn't you?

A. I wouldn't know.

Q. You mean the subject of rent control never came up before you as an escrow officer in a title company? A. No.

Q. The matter of whether or not a property is subject to rent control?

A. No, we were not concerned with it.

Q. That was not a matter that concerned you as an escrow officer in the title company?

A. No.

Q. Over a period of seven years? A. No.

(Testimony of Corwin Gabrielson.)

Q. Mr. Gabrielson, would your answer with respect to these conversations in this matter be any different if you knew that Northern Alameda County, where the Green Acres Motel is that you were talking about, was not under rent control at that time? A. No.

Q. It still would not be any different. So you, Mr. Bowser, Mr. Doyle and Mr. Fox in December, 1951, were discussing at great [40] length whether or not these premises in Hayward were under rent control, when the order which placed them under rent control was not made until January 12th, 1952?

A. That is correct.

Mr. Giometti: The order was published in the Federal Register in December, 1951.

Mr. Dowling: No, it is in 17 Federal Register, page 403, under date of January 12th, 1952.

The Court: What is that reference?

Mr. Dowling: 17 Federal Register, page 403, Schedule A of the Rent Regulation, was amended to include the Southern Alameda County Defense Rental Area on that date, January 12th, 1952, setting a maximum rent date of November 1st and an effective date of January 14th. That is subject to counsel checking it, your Honor. I am reasonably satisfied that that is correct.

Q. It was not—not until some time late in May or early in June that you first talked to Mr. Hyne about it, is that correct? A. That is correct.

Q. Meanwhile you had not talked to anybody

(Testimony of Corwin Gabrielson.)

about whether this master lease was subject to control, is that correct?

A. Nobody in a legal capacity.

Q. Nobody in a legal capacity; you had not sought any legal advice from your own counsel?

A. Oh, yes, we had talked to Bowser in the meantime.

Q. You had talked to Bowser meanwhile? [41]

A. In the meantime.

Q. Between January 1, 1952, and June?

A. Yes. See, I had conversations with Mr. Doyle maybe every week or two about reducing this rent or should do something, and then I would naturally be concerned and ask Mr. Bowser whether he thought in connection with that—he was quite sure they were not under control.

Q. It was not until July that you talked to Mr. Goldbaum in his offices in San Francisco?

A. That is right.

Q. Your recollection is that Mr. Goldbaum told you in July that this matter was pending in Washington at that time? A. Yes.

Q. And that he did not know whether it was under control or not? A. That is right.

Q. Would your answer to that question be any different, Mr. Gabrielson, if you knew that this file which has been introduced as Defendant's Exhibit A contained a copy of a letter from Mr. Goldbaum addressed to the law offices of Malone and Sullivan, carbon copy to the Area Rent Director at Hayward, California, under date of May 22nd, 1952, in which

(Testimony of Corwin Gabrielson.)

Mr. Goldbaum says, among other things, that the property is subject to control?

A. I do not think there would be any difference in this [42] respect. I think it was up for decontrol at the time, if I remember right. Therefore I don't know; if the decontrol came through, it wouldn't have been under control.

Q. So then by the time that you talked to him in July it had been ascertained that it was not under control and you were talking about decontrol, is that right? A. That is, if I recall, right, yes.

Q. So that by the time we get up to July, you knew it was under control and what you were attempting to do was getting it decontrolled?

A. No, I never knew it was under control until after the suit was actually filed. In my own mind I did not know it was under control. Nobody told me it was under control. My thought was that they were waiting for the opinion to find out whether it was under control or not.

Q. Mr. Gabrielson, let me direct your attention to Defendant's Exhibit C for identification, marked "Minutes of Rent Advisory Board Meeting, Southern Alameda County Defense Rental Area, July 15th, 1952." Do you recall that in there they are talking about decontrolling the property?

A. Yes.

Q. By the time you got hold of a copy of this you certainly knew they were talking about decontrol, didn't you?

A. I can see your point now, but at the time,

(Testimony of Corwin Gabrielson.)

no, I didn't think of it that way. I figured if they assumed it was not [43] under decontrol, it would be decontrolled as of the date of the regulation.

Q. As a matter of fact, all of your conversations with Mr. Hyne were along the lines of trying to get him to decontrol these premises, weren't they?

A. No. Mr. Hyne—our conversations with him were, would he collect the rent? "By all means. I don't think you come under this regulation." That is what we were going by.

Q. What is the latest date upon which Mr. Hyne was advising you, according to your best recollection?

A. I think it was sometime in June.

Q. Sometime in June?

A. I don't think I saw him later than that.

Q. Let me ask you this: Did Mr. Goldbaum give you the same advice when you talked to him in July?

A. As far as I interpret it, yes.

Q. Did he tell you to keep on collecting the rent?

A. No, we didn't even ask him. We were just concerned with whether this was controlled or was not controlled. From his conversation I gathered it was not under control.

Q. Did Mr. Goldbaum tell you it was not under control?

A. I wouldn't say that. I said I interpreted it. That was his opinion, that until he heard from Washington one way or the other, he couldn't tell. That shows I didn't know it was under the regulation. None of us did or we wouldn't have been in Mr. [44] Goldbaum's office. We would just have known it was under control.

(Testimony of Corwin Gabrielson.)

Q. You are talking about until after he heard from Washington? A. Yes.

Q. This is as of the time in July, you said?

A. Yes.

Q. Would your answer be any different if you knew that he had heard from Washington and had written a letter on May 22nd stating that these premises were under control?

A. According to our conversation in his office he had not determined—I don't know what answer he got from Washington, but he had not determined yet whether we came under control.

The Court: Who had not determined?

A. Mr. Goldbaum.

Q. (By Mr. Dowling): Mr. Hyne, you say, sometime in June told you to keep on collecting the rent? A. Yes.

Q. As a matter of fact, you not only collected it but you made demands for it, isn't that correct?

A. That is correct.

Q. In the months of July, August and September you served on Doyle three-day notices to pay up or quit, is that right? A. That is right.

Q. In connection with each of those notices you demanded the sum of \$2000 or the gross less \$500, whichever was higher? [45] A. Correct.

Q. At the time you made those demands you knew that Doyle contended the premises were under control, didn't you? A. No.

The Court: What was the first date when the

(Testimony of Corwin Gabrielson.)

contention was made by Mr. Doyle that the premises were under control, according to your recollection?

A. I can't ever recall.

The Court: There must have been correspondence on the subject.

Q. (By Mr. Dowling): You can't ever recall that he made such a contention?

A. Not to me personally and, of course, my working for the title company. Mr. Patterson was keeping most of the records and correspondence.

Mr. Dowling: Mr. Giometti, do you have in your files the original of the letter dated early in August from Mr. Doyle to Mr. Fox, Mr. Patterson and Mr. Gabrielson enclosing \$152 as rent for the month?

Mr. Giometti: I think so. I have no objection to your using the copy.

The Court: With that understanding the copy may be used.

Mr. Dowling: Thank you. May it be marked in evidence at this time?

The Court: Very well. [46]

(Whereupon the letter referred to above was received in evidence and marked Plaintiff's Exhibit No. 4.)

Q. (By Mr. Dowling): After receipt of that \$152 you served a notice to pay rent or quit on Mr. Doyle, didn't you?

A. I know we served a notice for the last two or three months.

(Testimony of Corwin Gabrielson.)

Mr. Dowling: The notice to pay rent, if your Honor please, I ask to be marked Plaintiff's exhibit next in order. It purports to bear the signature of Mr. Gabrielson.

The Court: What is the date?

Mr. Dowling: August 5th, 1952.

The Court: It may be marked. So ordered.

(Whereupon the notice to pay rent referred to above was received in evidence and maked Plaintiff's Exhibit No. 5.)

Q. (By Mr. Dowling): That is your signature, I take it, Mr. Gabrielson? A. Yes.

Q. Do you remember receiving a letter from Mr. Doyle under date of August 11th, 1952, tendering the balance of \$200 less the \$152 he had already paid?

The Court: Pardon me just a moment. May I follow the figures? Tendering the balance of \$200?

Mr. Dowling: Less the \$152 that had already been paid.

The Witness: I don't recall it, no. You see, Patterson [47] kept all of the books and most of the correspondence. Therefore I was not cognizant of all the correspondence that took place.

Q. When you signed this three-day notice to pay up or quit, did you know that Doyle had already paid \$152?

A. No, I would have made it up in the office because the facilities were there to send it out.

Q. You would have made it up without any

(Testimony of Corwin Gabrielson.)

knowledge at all as to whether Doyle had paid rent or not?

A. No, Patterson or Fox would have come in and said, "Let us make a three-day notice. We haven't got our rent." I would have made it.

Q. If Doyle had paid \$152 of rent I suppose they would have told you?

A. Yes, I suppose they would have.

Q. Do you recall that they told you?

A. No, I do not.

Q. Do you think you would remember ordinarily if somebody told you that Doyle was only going to pay \$152 a month rent now?

A. No, it would depend upon the circumstance whether I would or not.

Q. That is something you might not remember?

A. Yes. They may have told me while I was waiting on customers at the counter or something like that, and I may not have paid any [48] attention.

Mr. Dowling: There is a series of these. We might mark them as one exhibit if counsel has no objection.

The Court: Mark them as one exhibit.

Mr. Giometti: I have no objection.

(Whereupon the notices referred to above were received in evidence and marked Plaintiff's Exhibit No. 6.)

Q. (By Mr. Dowling): You were interested enough in this problem, though, to make some casual

(Testimony of Corwin Gabrielson.)

inquiries of attorneys who might drop in to the title insurance company?

A. Yes, every time that I would get a threat from Mr. Doyle I would wonder what is behind this and why does he make threats to us.

Q. When you found out that he contended the place was subject to rent control, you made some inquiries, is that right?

A. No, he didn't tell us it was subject to rent control.

Q. He never did?

A. He may have, but not until at least May or June, I know.

Q. Not until May or June?

A. Not until the time we went down to the Area Board and tried to find out.

Q. This rent registration statement that you filed was filed at a time when you felt the premises were not subject to control, is that right?

A. No, it was filed at a time when we were advised by the [49] Area Board that we should file it, because they didn't think it was under control. But I guess they were not positive themselves, so we figured, after all, if they are the control board, and so forth, if they advise us to do it, we had better do it.

Q. Did they advise you at some time it was not subject to control?

A. No, they said they did not think it was under control.

Q. Despite the fact that they did not think it

(Testimony of Corwin Gabrielson.)

was controlled, they advised you to file a registration statement? A. I guess as a precaution.

Mr. Dowling: I have no further questions.

Mr. Giometti: Just a few more questions of this witness, your Honor.

Redirect Examination

By Mr. Giometti:

Q. Mr. Gabrielson, this motel is located in Pleasanton, is that correct?

A. Near the town of Pleasanton, Pleasanton Township.

Q. As a matter of fact, there is a military base in that vicinity, is that correct?

A. That is correct.

Q. What is the name of that base?

A. Camp Parks Air Force Base.

Q. When was that base placed out there, Mr. Gabrielson?

The Court: Is it near Livermore?

Mr. Giometti: Yes, your Honor. [50]

The Court: That is an old training base. I remember it.

The Witness: I don't know. It was being built at the time we built the motel, and I think that is the reason we built the motel. I don't know when it came into operation, around February sometime, I believe, that it was formally opened.

Q. (By Mr. Giometti): That was 1951?

A. 1952, I believe.

(Testimony of Corwin Gabrielson.)

Q. 1952. I am sorry. It was being reactivated out there at the same time you were building your motel, is that correct? A. Yes.

Q. As a result of that, there were articles in the newspapers about that time pertaining to the building of that base, is that correct? A. Yes.

Q. Were here articles in the newspapers in the month of January, 1952, or December of 1952 dealing with the possibility and the probability of the reinstallation of rent control because of the establishment of that base?

A. I wouldn't doubt it because there was a lot of conversation about rent control, and I know we discussed it, both in Mr. Bowser's office and in Mr. Doyle's office.

Q. Mr. Gabrielson, do you know the difference between the terms "rent control" and "maximum rent"?

A. I don't know whether I do or not. [51]

The Court: We might define them. If he does not know, let us pass it. Is there any reason why he should know?

Mr. Giometti: I think it is in answer to these inferences that have been raised on cross-examination, your Honor. In other words, the maximum rent was never set, though it was stated that they were under control, and, of course, that could confuse an individual. That is the reason why I am asking the question.

The Court: Whether you are confused or not, what relevancy has that? If in fact there is an

(Testimony of Corwin Gabrielson.)

establishment of rent control, and if a maximum rental is described, what does it matter what may go through a man's mind, whether confusion is generated or not? The condition is created and there is the condition.

Mr. Giometti: I agree with that, of course, except that the point I had in mind is this——

The Court: However ironic it may be in many cases.

Mr. Giometti: Right.

Q. As to these premises, was a maximum rent ever established?

Mr. Dowling: I am going to object to that as a legal opinion and conclusion unless it is directed to the question whether an order was ever made.

The Court: I think so.

Mr. Dowling: If that is what counsel means to ask, I have no objection.

Mr. Giometti: Let us modify the question. [52]

Q. Was an order ever made establishing a maximum rent control on your premises at the motel for the master lease at Pleasanton?

A. Not that I ever knew of, and we never could find out from the rent control that there was a maximum.

Q. Did you request that a maximum rent be established? A. Yes, we did.

The Court: At any time was a maximum rent established?

A. I don't think up to this date one has been set, an order has been rendered.

(Testimony of Corwin Gabrielson.)

Mr. Giometti: I am referring to Plaintiff's Exhibit No. 6. There appears an address to which that letter was addressed. That is Mr. Patterson's address.

The Court: Did the Board ever make reference, or did any individual member of the Board ever make reference to the provision under which Mr. Dowling predicates his cause?

Mr. Giometti: No, the Board was specifically requested to set the maximum rent by comparable housing. The Rent Advisory Board said there was no comparable housing. We can't do it, and so they decontrolled it. Rent control went off and the matter died. I am now referring to Plaintiff's Exhibit No. 4, which is a letter.

Q. Whose address is that?

A. That is Mr. Patterson's.

Mr. Giometti: I have no further questions, your Honor.

Mr. Dowling: No further questions. [53]

GENE RHODES

called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court.

A. Gene Rhodes, 201 Walsh Building, Hayward, California. Attorney.

(Testimony of Gene Rhodes.)

Direct Examination

By Mr. Giometti:

Q. Mr. Rhodes, directing your attention to the year of 1952, what was your occupation at that time?

A. I was an attorney-at-law at that time, licensed in the state.

Q. Did you have during that period of time any connection with rent stabilization?

A. I was for the entire period of the effective dates of rent stabilization a member of the Rent Advisory Board of the Defense Rental Area of Southern Alameda County.

Q. How many members were there on the Board? A. Five.

Q. As a member of that Board, did you receive any inquiry from the owners of the Pleasanton Motel as to whether or not the master lease there was subject to rent control?

A. I received one inquiry around the last of May or the first of June—I am speaking just from memory—from Mr. [54] Gabrielson inquiring as to whether or not such a lease would be under control. I did not examine the lease in point in this case.

Q. Did you advise him at that time as to what the Board's position was?

A. I advised him at that time that I had heard some conversation about it from Mr. Hyne, who was the director of the Southern Alameda County Area, and that the matter was being studied and consid-

(Testimony of Gene Rhodes.)

ered, and that it was my personal opinion, although the Board had not formed an official opinion, that such a lease would not be subject to rent control under 39(c) or any other regulation.

Q. I show you Defendant's Exhibit C, which are the minutes of the Board meeting of the Board of which you are a member, is that correct?

A. Yes, I would say this is a copy of the minutes of the meeting as of July 15, 1952.

Q. Did you ever give a copy of those minutes to any of the owners of the motel?

A. I gave a copy to Mr. Gabrielson, and I later gave one to Mr. Gabrielson's attorney, Mr. Bowser.

The Court: This was written in your official capacity?

A. They were under the direction of each member of the Board by the Secretary of the Board.

Mr. Giometti: At this time I would like to ask that this [55] go into evidence, if the Court please.

Mr. Dowling: I would like to object unless the admission is for the limited purpose of establishing generally what went on at the Area Rent Board by way of establishing what might be done generally the good faith of the defendants. In other words, I do not think it has any materiality or bearing upon what is the maximum rent, if there is one.

The Court: The facts, I take it, were in keeping with the facts that you were confronted with?

A. Those are the facts, yes.

Q. Recommendation under 39(c). That is the section to which you made reference?

(Testimony of Gene Rhodes.)

A. Yes.

Q. And you considered at that time the 25-room base?

A. Yes, we did, your Honor. In considering the number of units, I think the Board uses a pattern of the number of sleeping rooms, and there were, I believe, over 25 sleeping rooms and some of these units were double-bedroom units.

The Court: I will admit it.

This was directed then to your clients, was it?

Mr. Giometti: That is correct. That was given to my clients.

The Court: Who presented it? Mr. Bowser?

Mr. Giometti: Mr. Rhodes delivered, as former evidence shows, this document to Mr. [56] Gabrielson.

The Court: All right.

(Whereupon Defendant's Exhibit C for identification was received in evidence.)

Q. (By Mr. Giometti): In your capacity on the Rent Advisory Board were you ever requested to compute a maximum rent for the motel in Pleasanton?

Mr. Dowling: I will object to that as incompetent, irrelevant and immaterial. I think it is conceded, if your Honor please, that no order was ever made by the Area Rent Director fixing rent for these premises pursuant to section 166, that they were not decontrolled as recommended in these

(Testimony of Gene Rhodes.)

minutes, and what preliminary steps might have been taken in connection with this, in connection with either of those ends, is completely immaterial.

Mr. Giometti: I will say this, your Honor: The position of the Rent Stabilization Board or the Office of Rent Stabilization was that these premises were subject to control. However, there is no maximum rent. The maximum rent is to be established by determining what the rent is for a comparable area or a comparable unit. If there was an attempt made to establish such a thing on the part of my clients, I think that that is pertinent at this time.

The Court: I will allow it.

A. I am unable to say as to whether or not we received a request from either of the litigants here, if that is what you [57] mean. We received a request from Mr. Hyne which was in the form of pleadings, that he had received a letter or a communication of some sort saying that Section 39(c) did apply to situations such as the one that was before the Board, and that we would therefore have to take some kind of action on 39(c). He suggested or he proposed to the Board three different alternatives, and the Board adopted one of those alternatives, which was a resolution as set forth in those minutes recommending that 39(c) be held by the National Director not to apply to Southern Alameda County because it was completely inapplicable to the situation, there being only one such motel in all of Southern Alameda County, and

(Testimony of Gene Rhodes.)

no practical means by which the Board felt that they could fix a maximum rent.

Q. In your conversation with Mr.—

A. I had better say just one thing. When I said only one motel in Southern Alameda County, I am thinking of the geographical location. There are other motels in what are known as East Oakland or near San Leandro, but over the City of Hayward on the county line there is no other motel that even remotely compares with the El Rancho.

Q. I do not recall if this question has been asked you, but did you at any time in your capacity as either an attorney or as a member of the Rent Control, Rent Advisory Board, advise any of the owners of the motel that the premises were or were not subject to control? [58]

A. Only by giving an opinion and by furnishing copies of the minutes. I did advise them before the matter ever came before the Board that it was my personal opinion that the regulations were not applicable to this situation, and I advised them after the Board—by “them” I mean only Mr. Gabrielson—I advised Mr. Gabrielson after the Board had the matter officially called to its attention that the Board still felt that 39(c) could not be applied to this situation, and I gave them my reasons for that.

Mr. Giometti: Thank you. I have no further questions of this witness.

(Testimony of Gene Rhodes.)

Cross-Examination

By Mr. Dowling:

Q. Mr. Rhodes, there were only these two occasions on which you advised and consulted with Mr. Gabrielson with reference to the applicability of the rent regulations to the underlying lease, is that correct?

A. To the best of my recollection, Mr. Dowling, that is correct: once before the matter was taken up by the Board at any meeting, and after the matter had been acted on in July.

Q. The first time was some time in May or June?

A. That is the best of my recollection, yes.

Q. Having in mind, Mr. Rhodes, that on May 22nd Mr. Goldbaum wrote a letter, carbon copy of which went to the Area Rent Director in Hayward, in accordance with which Mr. Goldbaum said that 39(c) was applicable, having in mind that that letter [59] bears date of May 22nd, would you say you spoke to Mr. Gabrielson some time prior to May 22nd?

A. I certainly would not be evasive to your question, but I just don't remember that. And I don't remember whether I spoke to him before that answer was received or after it was received. I can remember this, that the receipt of Mr. Goldbaum's letter did not change our opinion in this respect. We realized that 39(c) was on the books but we felt that the situation was incongruous with the spirit of that rent control law, which we tried

(Testimony of Gene Rhodes.)

to administer, and we still felt that that 39(c) should not apply to this, even though we received official directives that it technically did apply.

Q. In other words, by that time you were intellectually convinced but not emotionally convinced?

A. Not exactly. You see, although we received Mr. Goldbaum's letters, we received constant directives from Mr. Tighe Woods and his successor, who were the national directors, reminding us over and over what the spirit of these regulations was to be, how the local boards should interpret them, and we were very honestly looking for a way whereby we would not have to set a maximum rent in this particular case.

Q. Mr. Goldbaum, of course, was the Regional attorney at that time, wasn't he?

A. As far as I know, yes.

Q. When you gave this first opinion prior to the meeting of [60] the board some time in May or June you did not even examine the lease, is that correct?

A. I did not. They proposed a situation to me and recited it in narrative form. I did not examine the lease.

Q. That was done with you informally, I take it?

A. Very informally, yes.

Q. It was not done at any regular meeting of the Advisory Board?

A. Oh, no, sir. Mr. Gabrielson called to my of-

(Testimony of Gene Rhodes.)

fice about it. Actually it was a telephone conversation between Mr. Gabrielson and myself.

Q. Did he know at that time you were a member of the Rent Advisory Board?

A. I don't know whether he did or not when he called me. He did before the conversation was finished, because I told him it was a matter of particular interest to me.

Q. Had you known Mr. Gabrielson before that time?

A. Yes, I had known him for several years. I have also, for your information, to be fair with you, represented Mr. Gabrielson on other legal matters.

Q. Were you representing him in legal matters at the time that you were giving him this advice?

A. Well, perhaps you understand the situation as well as anybody. Somebody who had sought your advice on a matter before might call you on a phone, propose a suggestion to you, [61] and say, "What do you think about it?" and you say, "Well, I believe this would be my opinion."

Q. Let me be much more specific. You were not representing him in connection with any matters pertaining to this El Rancho Santa Rita Motel?

A. Oh, of course not, no.

Q. What I am trying to get around to, did he approach you in your capacity as an attorney to engage your professional opinion as his counsel, or did he approach you as a member of the local Rent Advisory Board to get your opinion?

(Testimony of Gene Rhodes.)

A. It would be awfully hard for me to say because he merely called me and presented the question to me without mentioning whether or not I was a member of the Board or mentioning anything else other than, as I remember it, just launching into the conversation as to what I thought about the situation.

Q. The second occasion you talked to him was after the meeting of July 15th? A. Yes, sir.

Q. Did you tell him at that time that there was some recommendation that the property be decontrolled?

A. I actually read to him the minutes or at least notes from the minutes and told him that I would give him a copy of them.

Q. And those minutes have to do with the matter of decontrol, do they not?

A. I suppose that is a matter of legal interpretation of that [62] term. Rather than decontrol, we felt that we were resolving that the section should be held not applicable to this case or to Southern Alameda County.

Q. What you proposed to do was to have the regulations amended so that it would not apply, isn't that correct?

A. We sought to secure a ruling saying that in a case where any underlying lease was executed, to give this two and a half month period, which caught this particular lease, and where there were no comparable units for comparison, that the regulation should not apply.

(Testimony of Gene Rhodes.)

Q. And that would have to be by amendment to the regulation, wouldn't it?

A. I would answer you if I could. I do not really know.

Q. Let me ask you this: Wasn't the purport of the action of the Rent Advisory Board to memorialize the National Rent Director to request him or to recommend to him that he so amend the regulations that they would be no longer applicable to this situation that you had in Pleasanton?

A. The purpose was to secure a ruling by him to that effect. Whether or not it would have been necessary to amend or not, I can't say.

Q. In any event, no such amendment was made and no such ruling was ever received?

A. That is correct, and the Board took no further action at all. You might say the matter reached a stalemate. [63]

Mr. Dowling: I have no further questions.

Mr. Giometti: I have just a couple of questions.

Redirect Examination

By Mr. Giometti:

Q. Have you ever seen that document before?

A. I believe I have, Mr. Giometti. We certainly attempted to examine every piece of information that we received on anything relative to this particular problem as well as to others, and I believe that I have seen this and I do recognize, of course, our office stamp showing that it was received in our office.

(Testimony of Gene Rhodes.)

Q. Will you tell the Court what that document represents?

A. Occasionally, with regularity—in fact, every month, if I remember—we received a letter from the General Counsel of the Office of Rent Stabilization making certain interpretations and suggestions to the Advisory Board. This represents the letter, according to its heading, for May, 1952, and contains at least one page dwelling on Section 39 of Rent Regulation No. 1.

Q. And specifically pertaining to the problem of this particular motel, is that correct?

A. Yes, it does.

Q. After this directive or this copy was received, you received a directive from the Area Office of the Rent Stabilization body, did you not, to establish a maximum rent?

A. I believe we received something of that nature, and in the group of documents Mr. Dowling is handling I believe there is [64] something of that nature, but I would have to look at it to refresh my recollection to say that that is the type of thing it was.

Q. Which document were you referring to?

A. Those which are bound with your red—yes, that group.

Q. Is this the document to which you refer?

A. Yes, sir, this document, which is the memorandum to F. C. Hyne, Area Rent Director, from William Goldbaum. Subject, El Rancho Santa Rita Motel Registration. Yes, sir, this was received in

(Testimony of Gene Rhodes.)

our office on the date it bears on its face on the stamp, June 11th, 1952.

Q. And you were requested at that time to establish a maximum rent under the provisions of Section 166 of Rent Regulation 1, is that correct?

A. We were asked to establish a maximum rent, and I am now trying to determine whether or not it was under 166. I take it that it was. Certainly we were asked to attempt to establish the maximum rent.

Q. Did you make an attempt to establish a maximum rent?

A. We asked our director, Mr. Hyne, and his assistant, Mr. Briggs, to make a study to determine whether or not it was possible in this case to establish a maximum rent using the same principles that were used in all other cases of establishing rents, and their report to us was that it was an impossible situation because of the uniqueness of the location and size [65] and the other factors of the motel.

Q. It was at that time then that the Rent Board ruled your request that Section 39(c) not be applicable to this particular area, is that correct?

A. That is correct.

The Court. What happened to the request?

A. The request was forwarded on to Washington. If you will excuse me just a minute to get my briefcase, I may have a note on what followed. I have here in my hand a copy of the minutes dated September 15th. I beg your pardon, it is September 9th, 1952, which I will read this brief sec-

(Testimony of Gene Rhodes.)

tion from, if that is what you would like, Judge. It says the Director presented a letter from Mr. Tighe Woods in reply to the resolution adopted by the Board, whereby they recommended that Section 39(c) of the regulations be rendered or be made inapplicable to the Southern Alameda County Defense Rental Area due to the fact that such underlying leases as prescribed in the regulations are not a part of the normal housing market in this area.

Specifically, this section applied to the El Rancho Santa Rita Motel in Pleasanton. The letter states that the resolution was given thorough consideration by the National Director but it had been rejected due to the fact that 39(c) has always been a part of the regulation and it could not be made inapplicable to one area.

A motion was then made, seconded and carried that when it [66] becomes necessary for the Rent Office to set the rents on the units involved, the Director be authorized to contact the motel Board of this area after recommendation as to the amount of rent they deem proper for the Rent Advisory Board and the Rent Office. Also said rent should be established on a prospective basis. A tenant's lease contains the right to cancel or terminate on and after October 1st, 1952, and it would therefore, that the exemption from the regulation would become applicable at that time.

That is the extent of the notation on that subject.

Mr. Giometti: I have no further questions, your Honor.

(Testimony of Gene Rhodes.)

Recross-Examination

By Mr. Dowling:

Q. The net effect of what you have been reading, Mr. Rhodes, as I gather it, is that the recommendation made by the local Advisory Board was rejected by the National Rent Director?

A. Yes, sir, that is correct.

Q. And that upon the grounds that 39(c) had always been a part of the regulations?

A. Yes, sir.

Mr. Dowling: I have no further questions.

Mr. Giometti: I believe Defendant's Exhibit C is for identification, is that correct?

Mr. Dowling: It has been admitted, I [67] think.

Mr. Giometti: At this time, if your Honor please, I should like to offer in evidence this memorandum from the Office of Rent Stabilization.

The Court: It may be marked. Do you have any objection to that?

Mr. Dowling: Only this: Again I have no objection to it for the limited purpose of such bearing it might have had on the state of mind of the defendants. I do not think it has any materiality as far as its legal opinion as to what the maximum rent is.

The Court: For that purpose it may be admitted.

(Whereupon the memorandum referred to

above was received in evidence and marked Defendant's Exhibit D.)

Mr. Giometti: The defendants rest, your Honor.

(Recess.)

Mr. Dowling: If your Honor please, I do not think the plaintiff will put on any testimony in rebuttal. Might I suggest to your Honor that memoranda be directed to your Honor in ten days?

The Court: Yes, I would suggest a memorandum of ten or fifteen days. Any time you agree on is agreeable.

Mr. Giometti: All right. Just so I understand the time element, your Honor.

The Court: What is the total amount prayed for in this case? What is the basis of the computation so that I will have [68] it in mind?

Mr. Dowling: I will set that forth in this memorandum. In the complaint as it was drawn it is presently framed on the basis of a ceiling rent of \$152. The prayer is for \$7,825 single damages in the original complaint and for an additional \$3,841 by supplemental complaint.

The Court: How long was your client in possession?

Mr. Dowling: He was in possession from January 1, 1952. Actual operations did not commence until about the middle of that month. He continued until the first of October, 1952, a period of nine months. There is the alternative theory suggested to your Honor this morning might prevail as a

matter of law, that the ceiling is not the dollars and cents ceiling but the formula established, namely, gross less \$500.

The Court: The first month was \$652 less \$500, which is \$152. That is the basis?

Mr. Dowling: That is the basis.

The Court: That is your contention?

Mr. Giometti: Are we speaking of the formula computation?

The Court: Formula.

Mr. Giometti: On the formula computation there was nothing paid on the first month.

The Court: That is right. January, nothing paid; February, \$152.

Mr. Giometti: Actually that was for rent. [69]

Mr. Dowling: Actually there was \$175 that was paid.

The Court: That would be a rather modest rental for 26 units.

Mr. Giometti: I think it would be.

The Court: I would like to rent a place like that.

Mr. Giometti: With a swimming pool, your Honor.

Mr. Dowling: Of course, we only had the swimming pool from July. If the formula applies on the other hand, if your Honor please, as I suggested to you, and as I recall, your Honor gave me leave to file an amendment to conform to proof in that respect, the single overcharges would be in the neighborhood of twenty-eight or twenty-nine

hundred dollars, and they would be within the months of March, April and May, and the date upon which those would be supported——

The Court: I will get your arithmetic from your memoranda. There is no claim for treble damages, is there?

Mr. Dowling: Oh, yes.

The Court: Upon what basis?

Mr. Dowling: Upon the basis that there is no showing that the overcharges were either willful or that the defendant took all reasonable and factual precautions. I think the testimony is clear from the testimony of both Mr. Fox and Mr. Gabrielson that, taking their testimony at its face value, they made some inquiries in this matter and got what was admittedly the correct answer at that time, that nothing was [70] under control, which it was not, the master lease, the subleases, or anything else; and subsequently they made no attempt to inquire into the matter until some time in June or May.

The Court: The lawyer from Hayward testified to that on the stand.

Mr. Dowling: In May, some five months later. In the intervening period between January and May they did not even make an attempt to find out.

The Court: Wouldn't it be indicated that a person might be well lulled into a state of quiescence during that period under the facts and circumstances surrounding this transaction?

Mr. Dowling: Only to the extent that it was

not a transaction subject to control at the time it was entered into.

The Court: They talked to a lawyer, who is a man of some ability in Oakland, Bowser.

Mr. Dowling: There is no question about his ability.

The Court: What is your view on this matter, counsel?

Mr. Giometti: As to the treble damages, your Honor?

The Court: Yes.

Mr. Giometti: I think these people took every possible precaution. First of all, in this matter they raised the question with their attorney. They were also advised by Mr. Doyle, the operator, that he was familiar with all of these things, and the question came up, and the only thing they thought was under control were the individual rooms. [71] Later, after they had been advised that the premises were not subject to control, after they had been threatened, and after an increase had been started, they consulted, actually consulted, your Honor, with the Area Rent Board. The Area Rent Board tells them, "This place is not under control, but go ahead and file your registration certificate anyway." That is the Director.

So they file the registration certificate. They attach a copy of the lease, and they do that in good faith. What happens with the mixup in between the Area Rent Office? As a matter of fact, the fault

here lay with the government agency rather than with any individuals, because the government agencies kicked this thing around and they kept kicking it around, and they kicked it around until the entire matter died. What happened? The form is filed. When they finally determined that the place is subject to control under 39(c), the Rent Director turns around and he says, "All right, go back then and advise me what the maximum rent is going to be."

The Advisory Board says, "We can't advise you what the maximum rent is going to be because there is nothing like this, so we suggest that this place be decontrolled. We can't establish a maximum rent."

The Court: Nothing was ever done.

Mr. Giometti: Nothing was ever done. It was just kicked around back and forth. When they came over here, they say, [72] "Send this matter back to Washington."

The Court: Mr. Dowling sits by the side of the road and says, "Nothing has been done." What is your answer to the legal proposition?

(Thereupon counsel for the respective parties and the Court entered into a discussion of the legal principles involved, which was reported but not transcribed, at the conclusion of which the matter was submitted on briefs.)

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 72 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ J. F. SWEENEY.

[Endorsed]: Filed December 15, 1954. [72-A]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint.

Stipulation and order permitting the filing of supplemental complaint.

Supplemental complaint.

Answer to complaint and supplemental complaint.

Request for admissions under Rule 36.

Answer to request for admissions.

Amendment to complaint to conform to evidence pursuant to Rule 15 (b).

Memorandum opinion and order.

Plaintiff's proposed amendments to defendants' proposed findings of fact and conclusions of law.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Cost bond on appeal.

Designation of contents of record on appeal.

Reporter's transcript of June 24, 1954.

Plaintiff's Exhibits Nos. 1 through 6, inclusive.

Defendants' Exhibits A through D, inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 16th day of December, 1954.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14601. United States Court of Appeals for the Ninth Circuit. James B. Doyle, Appellant, vs. Oliver A. Fox, J. E. Patterson and Corey Gabrielson, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 16, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals in and for
the Ninth Circuit

No. 14601

JAMES B. DOYLE,

Appellant,

vs.

OLIVER A. FOX, J. E. PATTERSON and
COREY GABRIELSON,

Appellees.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD
NECESSARY FOR THE CONSIDERA-
TION THEREOF

(Rule 17(6))

The appellant herein presents herewith his statement of the points on which he intends to rely on appeal, and designates the parts of the record which he thinks necessary for the consideration thereof.

Statement of Points on Appeal

1. The trial court erred in failing to find as follows:

“On December 31, 1951, the defendants, as lessors, entered into a written lease with the plaintiff, as lessee, under the terms and provisions of which the plaintiff leased from the defendants the said premises commonly known and designated as the El Rancho Santa Rita Motel for a term of three years to commence January 1, 1952. The said prem-

ises which were the subject of said lease were not rented at any time prior to December 31, 1951. Said premises were housing accommodations.”

2. The trial court erred in failing to find that the appellant remained in possession of said premises as the tenant of appellees continuously from January 14, 1952, to and until September 30, 1952.

3. The trial court erred in failing to find as follows:

“Under the terms of the said lease executed by and between the defendants and the plaintiff, the plaintiff agreed to pay as rental for each of the first two months of the term—namely, for the months of January and February, 1952—the gross receipts from the plaintiff’s operation of the said premises as a motel or motor court less the sum of Five Hundred and no/100 (\$500.00) Dollars each month. Under the terms of said lease, the plaintiff agreed to pay as rental for each of the months of March through September, 1952, his gross receipts as aforesaid less the sum of Five Hundred and no/100 (\$500.00) Dollars each month or the sum of Two Thousand and no/100 (\$2,000.00) Dollars, whichever was the greater amount. The plaintiff operated said premises as a motel or motor court from January 14, 1952, until September 30, 1952. In the month of January, 1952, the gross receipts from the operation of the said premises by the plaintiff were less than Five Hundred and no/100 (\$500.00) Dollars and no rent was paid for that month. In the month of February, 1952, the gross receipts from the operation of said premises

by the plaintiff were Six Hundred Fifty-Six and no/100 (\$656.00) Dollars and for the month of February, 1952, the plaintiff paid to the defendants the sum of One Hundred Seventy-Five and no/100 (\$175.00) Dollars as and for rent for said premises, there being a small overpayment of the rent payable under the lease arising out of mathematical mistake or miscalculation.”

4. The trial court erred in failing to find as follows:

“At no time prior to October 1, 1952, did the Director of Rent Stabilization, or the Area Rent Director of the Defense-Rental Area of Southern Alameda County, or any other person or persons appointed or designated by the Director of Rent Stabilization to carry out any of the duties delegated to him pursuant to the Housing and Rent Act of 1947, as amended, make or issue an order fixing, increasing or otherwise adjusting the maximum rent allowable for the said premises which were the subject of said lease between the defendants and the plaintiff.”

5. The trial court erred in failing to find as follows:

“Under the terms and provisions of the said lease between the defendants and the plaintiff, the plaintiff, as tenant, had no power to cancel or otherwise terminate the said lease prior to October 1, 1952.”

6. The trial court erred in failing to find as follows:

“All of the individual housing accommodations

in the said premises so leased by the defendants to the plaintiff, consisting of individual rooms and units in a motor court or motel, were controlled housing accommodations and were subject to the provisions of Rent Regulation 2.”

7. The trial court erred in failing to find as follows:

“The gross receipts from the plaintiff’s operation of the said leased premises as a motor court or motel were as follows: During the month of March, 1952, the sum of Nine Hundred Forty-Four and no/100 (\$944.00) Dollars; during the month of April, 1952, the sum of One Thousand Two Hundred Sixty-Two and 50/100 (\$1262.50) Dollars; during the month of May, 1952, the sum of Two Thousand Four Hundred Sixty-Two and no/100 (\$2462.00) Dollars; during the months of June through August, 1952, gross receipts in each month were not less than Two Thousand Five Hundred and no/100 (\$2500.00) Dollars. Within one year immediately prior to the commencement of this action the defendants demanded, accepted and received from the plaintiff as rent for the said housing accommodations leased from the defendants to the plaintiff the following sums: The sum of Two Thousand and no/100 (\$2000.00) Dollars as and for rent for the month of March, 1952; the sum of Two Thousand and no/100 (\$2000.00) Dollars as and for rent for the month of April, 1952; the sum of Two Thousand and no/100 (\$2000.00) Dollars as and for rent for the month of May, 1952; the sum of Two Thousand Four Hundred Thirty-

Three and no/100 (\$2433.00) Dollars as and for rent for the month of June, 1952; the sum of Two Thousand and no/100 (\$2000.00) Dollars as and for rent for the month of July, 1952; and the sum of Two Thousand One Hundred Forty-Five and no/100 (\$2145.00) Dollars as and for rent for the month of August, 1952.”

8. The trial court erred in failing to find that the appellant has been required to employ and has employed counsel to institute, maintain and prosecute this action against the appellees and, further, in failing to find what amount would constitute reasonable attorneys’ fees for the services performed by such counsel.

9. The trial court erred in finding as follows: “Defendants believed that their Master Lease with plaintiff was not subject to rent control. Defendants did not learn that they were required to register the premises with the Office of Rent Control until May, 1952. At that time, they requested of the Area Rent Director that he decontrol the premises or fix a fair rental. This he sought to do under Rent Regulation 1, Section 166. The Rent Director failed to win approval of a decontrol recommendation and he did not establish a maximum rent. The Advisory Board in Alameda County informed the Rent Director that there were no comparable housing accommodations in the Area to serve as a yardstick for fixing maximum rent. Controls expired during this period and there-

fore no maximum rent was ever fixed for said premises.”

10. The trial court erred in concluding that the maximum not having been declared or fixed in the first instance either by administrative process or judicial decree, any action fixing a maximum rental of an amount less than that called for in the lease would result in retroactive procedure wherein appellant would receive an unwarranted refund.

11. The trial court erred in concluding that the appellees were entitled to judgment against the appellant.

12. The trial court erred in failing to conclude that it had jurisdiction of the subject matter of this action and of the parties hereto.

13. The trial court erred in failing to conclude that the housing accommodations leased by the appellees to the appellant were controlled housing accommodations within the meaning of Rent Regulation 1 (Housing Rent Regulation) issued pursuant to the Housing and Rent Act of 1947, as amended.

14. The trial court erred in failing to conclude that, at all times between January 14, 1952, and September 30, 1952, the maximum lawful monthly rent for the said premises leased by the appellees to the appellant was the sum computed each month by taking the gross receipts from the appellant's operation of a motor court or motel on the leased

premises and deducting therefrom the sum of Five Hundred and no/100 (\$500.00) Dollars.

15. The trial court erred in failing to conclude that the amounts demanded, accepted and received by the appellees from the appellant as and for rent for said premises exceeded the maximum lawful rent for said premises in the amount of One Thousand Five Hundred Fifty-Six and no/100 (\$1556.00) Dollars for the month of March, 1952, in the amount of One Thousand Two Hundred Thirty-Seven and 50/100 (\$1237.50) Dollars for the month of April, 1952, and the amount of Thirty-Eight and no/100 (\$38.00) Dollars for the month of May, 1952.

16. The trial court erred in failing to conclude that the appellant was entitled to recover from the appellees three times the amount of single overcharges of rent and, in addition thereto, a reasonable sum as attorneys' fees.

17. The evidence does not support or sustain the findings of fact and conclusions of law, as aforesaid.

18. The findings of fact do not support or sustain the conclusions of law.

19. The findings of fact and conclusions of law do not support or sustain the judgment herein.

20. The trial court erred in ordering, adjudging and decreeing that appellant take nothing by

this action and that the appellees be awarded their costs herein.

Designation of Parts of Record Deemed Necessary
for Consideration of Appeal

Appellant designates the complete record, proceedings, evidence and exhibits in the action (original exhibits to be used in consideration of this appeal without reproduction in the record).

The foregoing statement of points on appeal and designation of parts of the record which appellant deems necessary for the consideration of said appeal is presented and filed in compliance with the provisions of Rule 17, subdivision 6, of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit.

Dated: December 27, 1954.

MALONE & SULLIVAN,
/s/ RAYMOND L. SULLIVAN,
/s/ WILLIAM J. MALONE, JR.,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 27, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION TO DISPENSE WITH
PRINTING OF ORIGINAL EXHIBITS

It is hereby stipulated, by and between the parties hereto that the original exhibits to be used on the consideration of this appeal need not be printed as part of the record herein and that all exhibits admitted in evidence in said action may be considered by the above-entitled court in their original form.

Dated: December 27, 1954.

MALONE & SULLIVAN,
/s/ RAYMOND L. SULLIVAN,
/s/ WILLIAM J. MALONE, JR.,
Attorneys for Appellant.
/s/ MARVIN G. GIOMETTI,
/s/ JAMES P. THORNTON, JR.,
Attorneys for Appellees.

[Endorsed]: Filed December 27, 1954.

No. 14,601

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES B. DOYLE,

Appellant,

VS.

OLIVER A. FOX, J. E. PATTERSON and
COREY GABRIELSON,

Appellees.

BRIEF FOR APPELLANT.

MALONE & SULLIVAN,

WILLIAM M. MALONE,

RAYMOND L. SULLIVAN,

WILLIAM J. DOWLING, JR.,

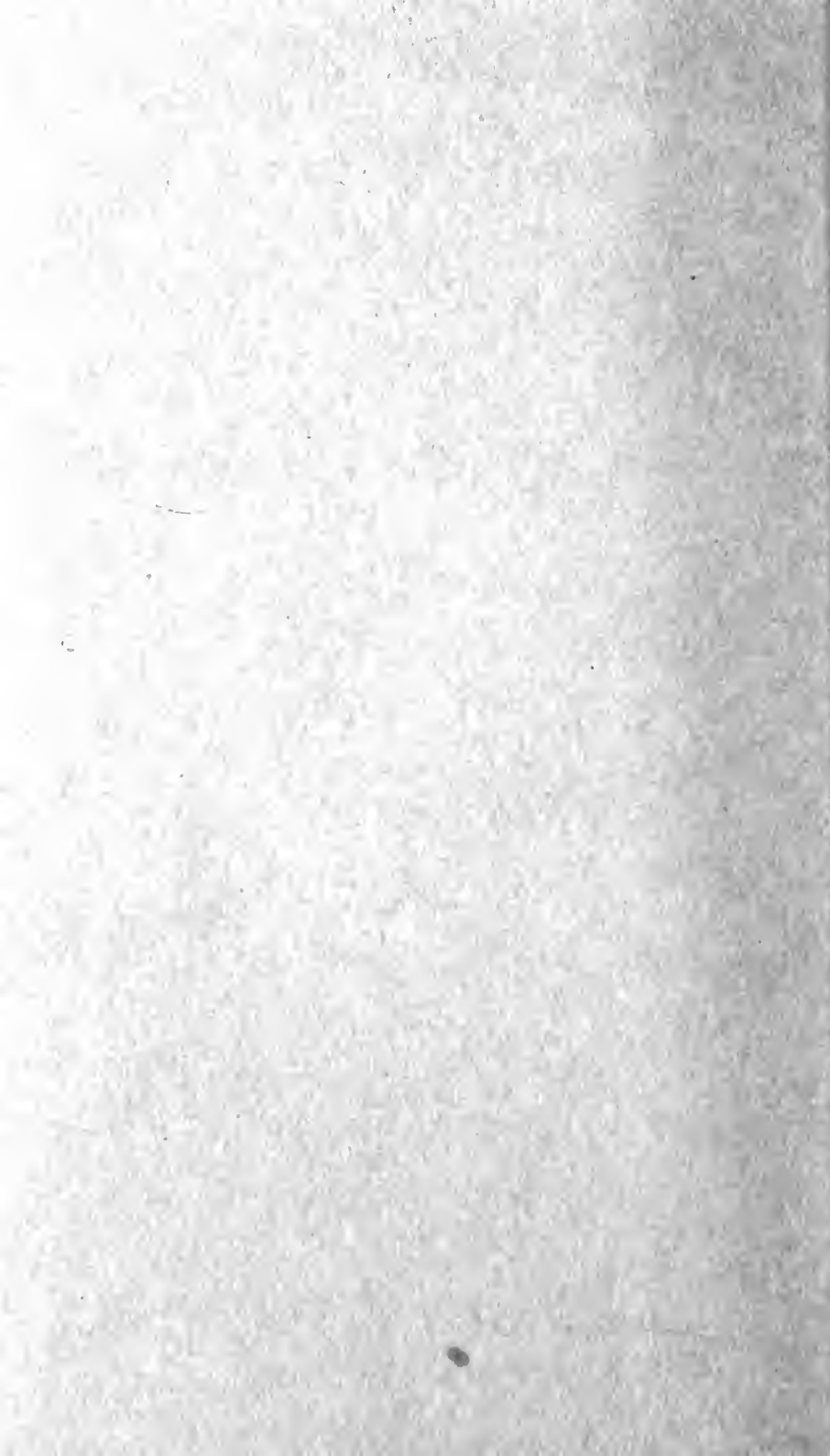
1120 Mills Tower, San Francisco 4, California,

Attorneys for Appellant.

FILED

APR 14 1955

PAUL P. O'BRIEN, CLERK



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No. 14,601

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JAMES B. DOYLE,

Appellant,

vs.

OLIVER A. FOX, J. E. PATTERSON and

COREY GABRIELSON,

Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

The complaint (Tr. 3), the supplemental complaint (Tr. 7) and the amendment to complaint to conform to evidence (Tr. 39) allege that, within one year immediately preceding the commencement of the action, the defendants demanded, accepted and received from the plaintiff, as rent for housing accommodations, sums in excess of the maximum lawful rents permissible under the Housing and Rent Act of 1947, as amended (50 U.S.C.A. App. Sec. 1881 et seq.) and the Housing Rent Regulation adopted pursuant thereto (Rent Regulation 1, 16 Federal Register 12,879, et seq.).

The jurisdiction of the trial court was founded on Section 205(a) and 205(c) of the Housing and Rent Act of 1947 as amended (50 U.S.C.A. App. Sec. 1895(a) and Sec. 1895(c)).

The jurisdiction of this court on appeal is founded on 28 U.S.C.A., Sec. 1291, which grants jurisdiction to review "final decisions" of the district courts. The judgment appealed from (Tr. 58) was made on October 12, 1954, and entered on October 13, 1954. The notice of appeal (Tr. 59) was filed with the clerk of the District Court on November 8, 1954, which was within the time allowed by Rule 73 of the Rules of Civil Procedure.

STATEMENT OF THE CASE.

1. Overcharges of Rent.

This is an action for treble damages for overcharges of rent. The premises involved in the action were situated in the Township of Pleasanton, Alameda County, California, within the Southern Alameda County Defense Rental Area (alleged in paragraph III of the complaint, Tr. 4, and admitted by paragraph III of the answer, Tr. 9). Housing accommodations in the Southern Alameda County Defense Rental Area were brought under control on January 12, 1952, by executive order which established November 1, 1951, as the maximum rent date and January 14, 1952, as the effective date (17 Federal Register 403).

It was conceded by the appellees at the trial of this action that the lease involved here was subject to rent control pursuant to the provisions of Section 39(c) of Rent Regulation 1, Housing Rent Regulation (16 Federal Register 12,879 et seq.) (Tr. 63).

Insofar as concerns the establishment of the lawful maximum rent, the amounts of money paid and received as rent, and the amount of overcharges—the facts in this case are not in dispute. They are admitted by the pleadings, or by the defendants' admissions on file in response to requests for admissions under Rule 36, were stipulated at the trial or, in one or two respects, were established by uncontradicted and unquestioned evidence admitted at trial. Briefly stated they are as follows:

On December 31, 1951, the appellant, as lessee, entered into a lease with the appellees as lessors (Plaintiff's Exhibit No. 1). (A copy of this lease is attached to the defendants' answer and appears in the printed record at Tr. 12 et seq.) This lease is the master lease or underlying lease of certain motel premises (Tr. 72). The premises were not rented on the maximum rent date, November 1, 1951, were, in fact, under course of construction at that time, and were first rented under the lease above referred to (Tr. 65; Tr. 87, 88; Request for admission No. 2, Tr. 37, admitted by answer to request for admissions, Tr. 38).

The lease provided by its terms for varying amounts of rental during the leasehold term. For the first two months, January 1, 1952, to February 29,

1952, the rent was fixed at the amount of gross receipts from the operation of the demised premises by the lessee, less Five Hundred and 00/100 Dollars (\$500.00) per month; for the period March 1, 1952, to and including September 30, 1952, the rent was fixed at the amount of gross receipts less Five Hundred and 00/100 Dollars (\$500.00) or Two Thousand and 00/100 Dollars (\$2,000.00), whichever amount was the higher; for the period subsequent to October 1, 1952, the rent was fixed at Three Thousand and 00/100 Dollars (\$3,000.00) per month (Plaintiff's Exhibit 1; Tr. 13). Inasmuch as the appellant's tenancy terminated on October 1, 1952 (Tr. 78) and this action involves only matters prior to that time, the Three Thousand and 00/100 Dollars (\$3,000.00) per month provision in the lease has no direct bearing on any issue here.

For the month of January, 1952, the gross receipts from the operation of the motel business by the appellant were less than Five Hundred and 00/100 Dollars (\$500.00) (Plaintiff's Exhibits No. 2 and No. 3) and no rent was paid for the month of January (Tr. 73). For the month of February, 1952, the gross receipts from the operation of the motel business by the appellant were Six Hundred and Fifty-Six and 00/100 Dollars (\$656.00) which should have produced a rental payment of One Hundred Fifty-Six and 00/100 Dollars (\$156.00) for the month of February in accordance with the formula provided for by the lease. However, apparently by reason of mathematical miscalculation, the rent paid for February was a

slightly higher amount, namely One Hundred and Seventy-Five and 00/100 Dollars (\$175.00) (Tr. 89, 90; Tr. 65, 66). This was the first money actually paid as rent for the premises (Tr. 90).

Subsequently, for each of the months of March, April and May, 1952, the appellant paid and the appellees received the sum of Two Thousand and 00/100 Dollars (\$2,000.00) as rent for the premises. This is alleged in the complaint (Tr. 5); it is admitted in the answer that the appellees received said sums as rent (Tr. 10); it was stipulated at the trial that the said sums were received as rent for the housing accommodations in question and that said sums were received as rent for the monthly periods alleged (Tr. 64).

It is the appellant's contention that the maximum lawful rent for the subject housing accommodations was the "first rent" and that such "first rent" was the formula: gross receipts less Five Hundred and 00/100 Dollars (\$500.00). The gross receipts for the months of March, April and May, 1952, were, respectively, Nine Hundred Forty-Four and 00/100 Dollars (\$944.00), One Thousand Two Hundred Sixty-Two and 50/100 Dollars (\$1,262.50) and Two Thousand Four Hundred Sixty-Two and 00/100 Dollars (\$2,462.00) (Plaintiff's Exhibits No. 2 and No. 3). Applying the formula, the lawful maximum rent for the month of March, 1952, was Four Hundred Forty-Four and 00/100 Dollars (\$444.00), for the month of April, 1952, was Seven Hundred Sixty-Two and 50/100 Dollars (\$762.50) and for the month

of May, 1952, was One Thousand Nine Hundred Sixty-Two and 00/100 Dollars (\$1,962.00). Inasmuch as the rent paid for each of those months was Two-Thousand and 00/100 Dollars (\$2,000.00) the resulting claimed single overcharges were One Thousand Five Hundred Fifty - Six and 00/100 Dollars (\$1,556.00), One Thousand Two Hundred Thirty-Seven and 50/100 Dollars (\$1,237.50) and Thirty-Eight and 00/100 Dollars (\$38.00) for the months of March, April and May, 1952, respectively; and the total claimed single overcharges for that period were Two Thousand Eight Hundred Thirty-One and 50/100 Dollars (\$2,831.50).

At no time prior to October 1, 1952, was any administrative order made or issued fixing, increasing or otherwise adjusting the maximum rent allowable for the leased premises (Tr. 79, 80; Request for Admission No. 6, Tr. 37, admitted by Answer to Request, Tr. 39).

The facts, as above set forth, bearing on the issue of the maximum lawful rent and the amount of single overcharges are not in dispute between the parties.

2. Treble Damages.

In view of the judgment denying recovery of any overcharges, it was not necessary for the trial court to pass upon the issue of treble damages. However, in response to the plaintiff's complaint for treble damages, the defendants pleaded a defense of "good faith" (Tr. 11) and later were permitted an amend-

ment to plead that the overcharge, if any, was not willful or the result of failure to take proper precautions (Tr. 68).

In this connection the evidence is that the appellees were advised by their attorneys in December, 1951, at the time the lease was being drafted, that the premises were not subject to rent control (Tr. 75, 92, 93). (The fact is that this was sound advice—the premises were not under control at that time.) The appellees made no further inquiries about the matter until late May or early June, 1952, when they first consulted the Area Rent Office in Hayward (Tr. 82, 83, 93). This failure to make inquiry for approximately six months was despite the fact that the appellee Gabrielson knew in February, 1952, that Parks Air Force Base, in the vicinity of the motel, was being reactivated and there were articles in the papers dealing with the possibility of rent control being re-established in that area (Tr. 108, 109).

SPECIFICATION OF ERRORS.

1. The trial court erred in failing to find as follows:

“On December 31, 1951, the defendants, as lessors, entered into a written lease with the plaintiff, as lessee, under the terms and provisions of which the plaintiff leased from the defendants the said premises commonly known and designated as the El Rancho Santa Rita Motel for a term of three years to com-

mence January 1, 1952. The said premises which were the subject of said lease were not rented at any time prior to December 31, 1951. Said premises were housing accommodations.”

2. The trial court erred in failing to find that the appellant remained in possession of said premises as the tenant of appellees continuously from January 14, 1952, to and until September 30, 1952.

3. The trial court erred in failing to find as follows:

“Under the terms of the said lease executed by and between the defendants and the plaintiff, the plaintiff agreed to pay as rental for each of the first two months of the term—namely, for the months of January and February, 1952—the gross receipts from the plaintiff’s operation of the said premises as a motel or motor court less the sum of Five Hundred and 00/100 Dollars (\$500.00) each month. Under the terms of said lease, the plaintiff agreed to pay as rental for each of the months of March through September, 1952, his gross receipts as aforesaid less the sum of Five Hundred and 00/100 Dollars (\$500.00), or the sum of Two Thousand and 00/100 Dollars (\$2,000.00) whichever was the greater amount. The plaintiff operated said premises as a motel or motor court from January 14, 1952, until September 30, 1952. In the month of January, 1952, the gross receipts from the operation of the said premises by the plaintiff were less than Five Hundred and 00/100 Dollars (\$500.00) and no rent was paid for that month. In the month of Febru-

ary, 1952, the gross receipts from the operation of said premises by the plaintiff were Six Hundred Fifty-Six and 00/100 Dollars (\$656.00) and for the month of February, 1952, the plaintiff paid to the defendants the sum of One Hundred Seventy-Five and 00/100 Dollars (\$175.00) as and for rent for said premises, there being a small overpayment of the rent payable under the lease arising out of mathematical mistake or miscalculation.”

4. The trial court erred in failing to find as follows:

“At no time prior to October 1, 1952, did the Director of Rent Stabilization, or the Area Rent Director of the Defense-Rental Area of Southern Alameda County, or any other person or persons appointed or designated by the Director of Rent Stabilization to carry out any of the duties delegated to him pursuant to the Housing and Rent Act of 1947, as amended, make or issue an order fixing, increasing or otherwise adjusting the maximum rent allowable for the said premises which were the subject of said lease between the defendants and the plaintiff.”

5. The trial court erred in failing to find as follows:

“Under the terms and provisions of the said lease between the defendants and the plaintiff, the plaintiff, as tenant, had no power to cancel or otherwise terminate the said lease prior to October 1, 1952.”

6. The trial court erred in failing to find as follows:

“All of the individual housing accommodations in the said premises so leased by the defendants to the plaintiff, consisting of individual rooms and units in a motor court or motel, were controlled housing accommodations and were subject to the provisions of Rent Regulation 2.”

7. The trial court erred in failing to find as follows:

“The gross receipts from the plaintiff’s operation of the said leased premises as a motor court or motel were as follows: During the month of March, 1952, the sum of Nine Hundred Forty-Four and 00/100 Dollars (\$944.00); during the month of April, 1952, the sum of One Thousand Two Hundred Sixty-Two and 50/100 Dollars (\$1,262.50); during the month of May, 1952, the sum of Two Thousand Four Hundred Sixty-Two and 00/100 Dollars (\$2,462.00); during the months of June through August, 1952, gross receipts in each month were not less than Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00). Within one year immediately prior to the commencement of this action the defendants demanded, accepted and received from the plaintiff as rent for the said housing accommodations leased from the defendants to the plaintiff the following sums: The sum of Two Thousand and 00/100 Dollars (\$2,000.00) as and for rent for the month of March, 1952; the sum of Two Thousand and 00/100 Dollars (\$2,000.00) as and for rent for the month of April, 1952; the sum of Two Thousand and 00/100 Dollars (\$2,000.00) as and for rent

for the month of May, 1952; the sum of Two Thousand Four Hundred Thirty-Three and 00/100 Dollars (\$2,433.00) as and for rent for the month of June, 1952; the sum of Two Thousand and 00/100 Dollars (\$2,000.00) as and for rent for the month of July, 1952; and the sum of Two Thousand One Hundred Forty-Five and 00/100 Dollars (\$2,145.00) as and for rent for the month of August, 1952.”

8. The trial court erred in failing to find that the appellant has been required to employ and has employed counsel to institute, maintain and prosecute this action against the appellees and, further, in failing to find what amount would constitute reasonable attorneys’ fees for the services performed by such counsel.

9. The trial court erred in finding (Tr. 56) as follows:

“Defendants believed that their Master Lease with plaintiff was not subject to rent control. Defendants did not learn that they were required to register the premises with the Office of Rent Control until May, 1952. At that time, they requested of the Area Rent Director that he decontrol the premises or fix a fair rental. This he sought to do under Rent Regulation 1, Section 166. The Rent Director failed to win approval of a decontrol recommendation and he did not establish a maximum rent. The Advisory Board in Alameda County informed the Rent Director that there were no comparable housing accommodations in the area to serve as a yardstick for fixing maximum

rent. Controls expired during this period and therefore no maximum rent was ever fixed for said premises.”

Such finding was erroneous because, insofar as it purports to bear upon the issue of treble damage, it is insufficient to establish absence of willfulness or the taking of practicable precautions against the occurrence of the overcharge; and, insofar as it purports to apply the provisions of Section 166 of Rent Regulation 1 to the matters here involved, it proceeds from a misapprehension of the applicable law, Section 166 being entirely inapplicable to a determination of the maximum lawful rent.

10. The trial court erred in concluding (Tr. 56) that the maximum rental not having been declared or fixed in the first instance either by administrative process or judicial decree, any action fixing a maximum rental of an amount less than that called for in the lease would result in retroactive procedure wherein appellant would receive an unwarranted refund.

Such conclusion is erroneous in that the maximum lawful rent was fixed by the applicable rent regulation, it being the proper function of the court, on the basis of the facts admitted and in evidence, to determine and conclude what that maximum lawful rent was.

11. The trial court erred in concluding (Tr. 57) that the appellees were entitled to judgment against the appellant.

12. The trial court erred in failing to conclude that it had jurisdiction of the subject matter of this action and of the parties hereto.

13. The trial court erred in failing to conclude that the housing accommodations leased by the appellees to the appellant were controlled housing accommodations within the meaning of Rent Regulation 1 (Housing Rent Regulation) issued pursuant to the Housing and Rent Act of 1947, as amended.

14. The trial court erred in failing to conclude that, at all times between January 14, 1952, and September 30, 1952, the maximum lawful monthly rent for the said premises leased by the appellees to the appellant was the sum computed each month by taking the gross receipts from the appellant's operation of a motor court or motel on the leased premises and deducting therefrom the sum of Five Hundred and 00/100 Dollars (\$500.00).

15. The trial court erred in failing to conclude that the amounts demanded, accepted and received by the appellees from the appellant as and for rent for said premises exceeded the maximum lawful rent for said premises in the amount of One Thousand Five Hundred Fifty-Six and 00/100 Dollars (\$1,556.00) for the month of March, 1952, in the amount of One Thousand Two Hundred Thirty-Seven and 50/100 Dollars (\$1,237.50) for the month of April, 1952, and the amount of Thirty-Eight and 00/100 Dollars (\$38.00) for the month of May, 1952.

16. The trial court erred in failing to conclude that the appellant was entitled to recover from the appellees three times the amount of single overcharges of rent and, in addition thereto, a reasonable sum as attorneys' fees.

17. The evidence does not support or sustain the findings of fact and conclusions of law, as aforesaid.

18. The findings of fact do not support or sustain the conclusions of law.

19. The findings of fact and conclusions of law do not support or sustain the judgment herein.

20. The trial court erred in ordering, adjudging and decreeing that appellant take nothing by this action and that the appellees be awarded their costs herein.

ARGUMENT.

1. **THE UNDERLYING LEASE BETWEEN THE APPELLANT AND THE APPELLEES WAS SUBJECT TO CONTROL UNDER THE PROVISIONS OF RENT REGULATION 1, HOUSING RENT REGULATION.**

It was stipulated at the time of trial that the underlying lease between the plaintiff and defendants was subject to control pursuant to the provisions of Section 39(c) of Rent Regulations 1 (Tr. 63).

Section 39(c) provides:

“This regulation does apply to an underlying lease of any entire structure or premises which was entered into after the maximum rent date and prior to the effective date of the regulation while such lease remains in force with no power

in the tenant to cancel or otherwise terminate the lease, unless all of the housing accommodations in such structure are exempt or decontrolled under the provisions of sections 36 to 58 and are not subject to the provisions of Rent Regulation 2."

The lease here involved was entered into on December 31, 1951 (Plaintiff's Exhibit No. 1) which was after the maximum rent date (November 1, 1951) and prior to the effective date (January 14, 1952); the maximum rent date and the effective date were so fixed in the order bringing Southern Alameda County Defense Rental Area under control (17 Federal Register 403, January 12, 1952); during the period in question the tenant had no power to cancel or terminate the lease (Plaintiff's Exhibit No. 1, Tr. 15); the housing accommodations in the structure were not exempt or decontrolled and were subject to the provisions of Rent Regulation 2.

**2. THE MAXIMUM RENT FOR THE PREMISES WAS FIXED
BY SECTION 93 OF RENT REGULATION 1.**

The rent regulations are clear and explicit. For housing accommodations in a defense-rental area not under control on September 19, 1951, the maximum rents are fixed by Sections 91-99 inc. of Rent Regulation 1. Section 93 applies to the instant situation. It provides:

"For housing accommodations not rented on the maximum rent date which are rented after the maximum rent date, the maximum rent shall

be the first rent for such accommodations after the maximum rent date * * *”

The housing accommodations here involved were not rented on the maximum rent date (Tr. 65) construction of them was not completed until after that date (Tr. 87); they were first rented after the maximum rent date. Consequently the maximum rent is the *first rent* for such accommodations.

The fact that the lease provides for varying rent at other times during the term of the lease does not affect the situation. The basic prohibition against collecting excessive rent is contained in Section 71 of Rent Regulation 1, which prohibits the receipt of rent in excess of the maximum lawful rent “*regardless of any * * * lease * * * heretofore or hereafter entered into * * **” (Emphasis ours). It should further be noted that Section 130 expressly contemplates a situation where there may be varying rents under a lease. One of the grounds upon which the landlord may petition for an adjustment of rent is stated as follows:

“Sec. 130. Varying rents. The rent on the date determining the maximum rent was established by a lease or other rental agreement which provided for a higher rent as other periods during the term of such lease or agreement.”

It is clear that the provision in a lease for varying rents does not affect the establishment of the *first rent* as the maximum rent. It simply permits an application for adjustment. It is admitted that no application for adjustment was made and no order adjust-

ing maximum rent was ever issued (Defendants' Answer to Request for Admissions No. 6 and No. 7, Tr. 37, 39; Tr. 79, 110).

That the first rent is the maximum lawful rent would appear to be so evident from the plain language of the regulation as to beggar argument.

3. THE FIRST RENT WAS GROSS RECEIPTS LESS FIVE HUNDRED AND 00/100 DOLLARS (\$500.00).

The maximum lawful rent, as established by Section 93, is the first rent. What is the first rent?

In the language of the lease which is in evidence (Plaintiff's Exhibit 1) the first rent payable by the lessee was to be computed as follows:

“From the commencement hereof, to and including the 29th day of February, 1952, Lessee shall pay over to Lessor each month as rent under this lease, the whole amount of the gross receipts from said operation on the demised premises, less Five Hundred Dollars (\$500.00) per month only
* * * ”

Pursuant to that provision of the lease (Tr. 13) the lessee paid no rent to the lessors for the month of January, 1952 (Tr. 73), because the gross receipts were less than Five Hundred and 00/100 Dollars (\$500.00) (Plaintiff's Exhibits No. 2 and No. 3); for the month of February the lessee paid to the lessors the sum of One Hundred Seventy-Five and 00/100 Dollars (\$175.00) as rent (Tr. 89, 90). Gross receipts

less Five Hundred and 00/100 Dollars (\$500.00) would have actually produced a rental of One Hundred Fifty-Six and 00/100 Dollars (\$156.00), according to the evidence of gross receipts admitted at trial (Plaintiff's Exhibits No. 2 and No. 3). The small difference between One Hundred Fifty-Six and 00/100 Dollars (\$156.00) and One Hundred Seventy-Five and 00/100 Dollars (\$175.00) actually paid apparently resulted from some mathematical miscalculation.

No case has come to our attention in which the courts have had occasion to consider the meaning of the term "first rent" under circumstances similar to those here involved. However the same type of situation, involving the computation of rent on the basis of a percentage of gross receipts, was the subject of official interpretation by the Office of Price Administration in the early days of rent control. Although that interpretation deals with a percentage lease, the concept of gross receipts less a fixed sum is not so different as to warrant different treatment or consideration. In either case there is a formula involved for determining the maximum lawful rent; the maximum lawful rent is the formula itself, and not a definite amount in dollars; in the one case the maximum lawful rent is that percentage of gross receipts provided for on the maximum rent date, in the other case the maximum lawful rent is the formula of gross receipts less a fixed sum provided for on the maximum rent date. While the dollar amount of rent may fluctuate, in either case, depending on the amount of gross receipts, the formula in effect on the maximum rent

date remains the standard by which the allowable rent is computed.

The official interpretation referred to is as follows:

“1. A written lease of a hotel structure, in effect on the maximum rent date, provides for rent based on a percentage of the gross receipts from the operation of the hotel by the tenant. On April 1, 1941, the maximum rent date, the rent payable for the month in which the maximum rent date falls amounts to \$150.00. Under the same lease the average monthly rent for 1941 amounts to \$450.00.

Section 4 does not require that the rent be a definite amount in dollars. In a case where on the maximum rent date the tenant of a hotel structure or of a rooming house was obligated under a lease then in effect to pay a percentage of the gross receipts from the business conducted by the tenant in the structure, *while that percentage cannot be increased*, the actual dollar amount paid by the tenant to the landlord may fluctuate. This rental provision in the lease, if it was in effect on the maximum rent date, establishes the maximum rent.” (Emphasis ours.)

(O.P.A. Interpretation M.R.-I. issued July 7, 1942; revised May 15, 1943—Pike and Fischer, O.P.A. Service, Vol. 8, page 200:1115.)

(Official interpretations of the Office of Price Administration have been adopted and confirmed successively by the Office of Temporary Controls (11 Federal Register 14, 704) the Office of Housing Expediter (12 Federal Register 2987) and the Office of Rent Stabilization (16 Federal Register 7631).)

In the instant case the first rent provided to be paid by the appellant to the appellees under the lease was gross receipts less the sum of Five Hundred and 00/100 Dollars (\$500.00) (Plaintiff's Exhibit No. 1; Tr. 13). This rental provision in the lease established the maximum rent. The collection of a minimum of Two Thousand and 00/100 Dollars (\$2,000.00) per month for the months of March, April and May, 1952, constituted an overcharge to the extent that such sums exceeded gross receipts less Five Hundred and 00/100 Dollars (\$500.00).

4. IT IS THE PROVINCE OF THE COURT TO DETERMINE THE MAXIMUM RENT UNDER ALL THE FACTS, APPLYING THE STATUTE AND THE REGULATIONS, AND NO ADMINISTRATIVE ACTION PURSUANT TO SECTION 166 OF THE HOUSING RENT REGULATION IS REQUIRED.

In the instant case the trial court concluded that, the maximum rental not having been declared or fixed in the first instance, either by administrative process or judicial decree, any action fixing a maximum rental of an amount less than that called for in the rental clause of the lease would, in effect, result in retroactive procedure wherein appellant would receive an unwarranted refund (Tr. 56). Apparently this conclusion was responsive to the finding that the Rent Director did not establish a maximum rent for the premises pursuant to Section 166 of Rent Regulation 1 (Tr. 56).

Both the finding and the conclusion proceed from a misapprehension as to the applicable law. There isn't any question of "fixing" a maximum rent by means of this action. The function and province of the court is to determine what the maximum rent was during the period in question, applying the applicable statutes and regulations to the facts.

Section 166 of the Housing Rent Regulation has no applicability whatsoever. This section, in pertinent part, provides as follows:

"Sec. 166. *Orders where facts are in dispute, in doubt, or not known.* If the maximum rent, or any other fact necessary to the determination of the maximum rent * * * is in dispute between the landlord and the tenant, or is in doubt, or is not known, the Director at any time on his own initiative, may enter an order fixing the maximum rent by determining such fact * * * If the Director is unable to ascertain such fact, or facts, he shall enter the order on the basis of the rent which he finds was generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date. * * * "

If the Rent Director had fixed the maximum rent pursuant to Section 166, then the section and any determination made pursuant thereto would have been relevant. But, in this case, no order fixing maximum rent was ever made pursuant to Section 166 (Tr. 79, 80, 110, 123; Request for Admission No. 6, Tr. 37, admitted by Answer to Request, Tr. 39). Consequently it becomes the province of the court to determine what the maximum rent was.

This is fully considered and, we respectfully submit, determined in every respect in accord with the appellant's contentions in a well-reasoned opinion by Chief Judge Magruder in *United States v. McCrillis*, 1st Cir. 1952, 200 F2 884. The court considers at some length the matter of section 166 as it affects the jurisdiction and the function of the courts.

That was an action for restitution, damages and injunctive relief brought under the Housing and Rent Act of 1947. Because the premises had been controlled under the Emergency Price Control Act of 1942, the maximum rent under the 1947 Act was the rent in effect on the "freeze date" March 1, 1942. There was a dispute as to what that rent actually was. The landlord had registered the maximum rent as being \$35.00 per month. At the time of such registration, in 1942, the tenant was one Imhoff. In June 1943 Imhoff was succeeded as a tenant by one Fleming who agreed to pay \$35.00 per month and, in addition, incur the expense of certain repairs. Subsequent to the enactment of the Housing and Rent Act of 1947, the defendant rented to one Appleby at \$50.00 per month and later, from June 1, 1948, to June 1, 1949, to one Bolin at \$65.00 per month. This action is based on the alleged overcharges arising out of the Bolin tenancy. The landlord's defense was that the rent received from Imhoff on the freeze date in 1942 was actually \$65.00 per month (despite the registration of the rent at \$35.00), and consequently the lawful maximum was \$65.00 per month.

Subsequent to June 1, 1949, but prior to the commencement of the action, *the area rent director purported to make an order determining maximum rent, which order was premised upon section 166 (14 FR 5718, sec. 825.5(d))*. The area rent director found that the rent actually paid on the freeze date was only \$35.00 and fixed the maximum rent at that amount retroactive to July 1, 1947.

The court concluded, however, that the order of the rent director was invalid for failure to give notice of the proceedings to the landlord and because, in any event, such an order could not be given retroactive effect.

There is no hesitancy in affirming the right of the courts to determine the facts which establish the maximum rent. The court says, at p. 890:

“For cases where there is a dispute or doubt as to the fact necessary to the determination of a maximum rent, we can see that it was an appropriate exercise of the regulatory power, in aid of the orderly administration of the Act, for the Housing Expediter to provide, after notice and hearing, for the administrative determination of such doubtful or disputed fact, so as definitely to fix the maximum rent, for the future, in accordance with that determination. Once a maximum rent has thus been validly established, the landlord has got to observe it, and in an enforcement suit based upon alleged subsequent overcharges the landlord cannot go back of the order and get a trial de novo on the disputed fact.

But when the tenant Bolin complained to the area rent office in May, 1949, the appellees had either demanded and received an amount in excess of the maximum rent during the preceding periods, or they had not. That depended upon whether the rent on the freeze date was \$35, or \$65 per month. The Act itself fixed the maximum rent from and after July 1, 1947, continuing through the period of alleged violations here involved. *If issues of fact should arise as to what rent was being charged on the freeze date, as well as what rent was being charged during the periods of alleged overcharges, these are ordinary factual issues that can be perfectly well determined in the enforcement court; they are not matters within the peculiar competence of the administrative agency. It serves none of the purposes of the Act for the administrative agency, in anticipation of the filing of an enforcement suit relating to past violations, to make an administrative determination of one or more issues of fact which would normally be determined in the enforcement court.*” (Emphasis ours.)

And at p. 887:

“Such maximum rent, *whatever its correct amount in fact*, remained in this case the lawful maximum rent * * * ” (Emphasis ours.)

And again at p. 887, quoting from *Kalwar v. McKinnon*, 152 F2 263, 264:

“ ‘ * * * in any litigation where the point becomes relevant the rent which was actually being charged on the freeze date must be factually determined.’ ”

What is more, the court held invalid a subsequent identical order of the rent director, made after notice to the landlord, but also made after the commencement of the action. It was held to be invalid not only because the order could not be made retroactive, but for the further reason that the “relevant issues of fact had been committed to the determination of the court” and “the government could not restrict the jurisdiction of the court by swooping down with an administrative determination of the only serious issue of fact pending for decision in the judicial proceeding” (p. 891).

It would seem clear then that if we had an issue of fact to be resolved in the instant case, the court would be the appropriate place to have it resolved. But, we respectfully submit, there isn't even an issue of fact to be resolved. What is presented is primarily a question of law—what is the maximum rent, what is the *first rent*, as determined from the undisputed facts.

We respectfully submit that in this case the trial court should have found, in accordance with the admitted or undisputed facts, that the first rent was gross receipts less Five Hundred and 00/100 Dollars (\$500.00) and that this constituted the lawful maximum rent. The trial court should have found further that the gross receipts from the operation of the leased premises for the months of March, April and May, 1952, were, respectively, Nine Hundred Forty-Four and 00/100 Dollars (\$944.00), One Thousand Two Hundred Sixty-Two and 50/100 Dollars

(\$1,262.50) and Two Thousand Four Hundred Sixty-Two and 00/100 Dollars (\$2,462.00) (Plaintiff's Exhibits No. 2 and No. 3), and the court should have concluded that the maximum lawful rents in dollar amount for those months were, respectively, Four Hundred Forty-Four and 00/100 Dollars (\$444.00), Seven Hundred Sixty - Two and 50/100 Dollars (\$762.50) and One Thousand Nine Hundred Sixty-Two and 00/100 Dollars (\$1,962.00). The receipt by the appellees of rent in the amount of Two Thousand and 00/100 Dollars (\$2,000.00) for each of those months (Tr. 64) constituted an overcharge.

5. **THE APPELLANT IS ENTITLED TO JUDGMENT FOR AN AMOUNT NOT LESS THAN SINGLE NOR MORE THAN TREBLE THE AMOUNT OF THE OVERCHARGE OF RENT.**

The appellant is entitled, under the statute, to recover not more than three times the amount of the overcharge unless the appellees shall establish that the overcharges were neither willful nor the result of failure to take practicable precautions against the occurrence of the violation (50 U.S.C.A. App. Sec. 1895(a)).

The burden of establishing the lack of willfulness and the taking of practicable precautions is upon the appellees.

Tanimura v. United States, 9 Cir. 1952, 195 F2 329, 330;

Orenstein v. United States, 1 Cir. 1951, 191 F2 184, 188, 192.

While it was unnecessary for the trial court to pass upon the issue of treble damages, in view of the judgment denying recovery of any overcharges, we feel that some brief comment might be directed appropriately to this matter. Giving full weight and complete credence to the testimony of appellees Fox and Gabrielson, and to appellees' witness Rhodes, the most that can be said is that the appellees were advised by their attorneys in December, 1951, that the premises were not subject to rent control (Tr. 75, 92, 93), and that they then made no further inquiries about the matter until late May or early June, 1952, when they first consulted with the Area Rent Office in Hayward (Tr. 82, 83, 93). The advice in December, 1951, was good advice—the premises were not under control at that time, but were brought under control on January 12, 1952 (17 Federal Register 403). There is no explanation as to why the appellees made no further inquiries about the matter for the next five or six months, particularly in view of the fact that the appellee Gabrielson knew that Parks Air Force Base, in the vicinity of the motel, was being reactivated and there were articles in the papers dealing with re-establishment of rent control in that area (Tr. 108, 109).

It would seem clear that no precautions of any sort were taken against the occurrence of the violations from the time that rent control was re-established in January until sometime late in May or in June.

CONCLUSION.

For the foregoing reasons the judgment of the trial court should be reversed with directions to enter judgment for the appellant in an amount not less than the single overcharges of rent, namely Two Thousand Eight Hundred Thirty-One and 50/100 Dollars (\$2,831.50), and in such greater amount not in excess of treble the amount thereof as may seem proper to the court, and for reasonable attorneys' fees.

Dated, San Francisco, California,

April 11, 1955.

Respectfully submitted,

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No. 14,601

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES B. DOYLE,

Appellant,

VS.

OLIVER A. FOX, J. E. PATTERSON and

COREY GABRIELSON,

Appellees.

BRIEF FOR APPELLEES.

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FILED

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IN THE

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JAMES B. DOYLE,

Appellant,

VS.

OLIVER A. FOX, J. E. PATTERSON and
COREY GABRIELSON,

Appellees.

BRIEF FOR APPELLEES.

SUPPLEMENTAL STATEMENT OF THE CASE.

The facts as stated by Appellant in his opening brief are correct. Appellee, however, desires to present certain additional facts for the Court's consideration.

As is set forth in Appellant's opening brief the Appellees were the lessors of a new motel situated in Pleasanton, Alameda County, California. The motel consisted of 22 rental units, acreage adjacent to the motel, and a swimming pool. (T.R. 72.) The units were all furnished by the lessors. All furniture was new and made of ash. The kitchens were equipped with General Electric Kitchens, which in-

cluded among other things refrigerators and stoves. (T.R. 72.) In addition the Appellees provided the linens and were obligated to replenish them. (T.R. 73.)

In November of 1951 the Appellant sought out the Appellees and requested the opportunity to lease the premises representing to the Appellees that because of his experience in the motel business he could successfully operate this one. (T.R. 92.) Further negotiations followed, eventually resulting in a lease-purchase agreement.

Prior to the effective date of the lease-purchase agreement the Appellees communicated with the Area Rent Office at Hayward, California, to inquire if the agreement was subject to rent control. (T.R. 74.) They were advised that the master lease was not subject to control. (T.R. 74.) They were likewise advised by the law office of Hynes & Bowser, that the master lease was not subject to control. (T.R. 93.)

In May of 1952 an inquiry was forwarded from the Hayward Rent Office to the San Francisco Office requesting an opinion as to whether or not the master lease was subject to control. The inquiry was relayed to the chief counsel for the Office of Rent Stabilization, Washington, D. C. In due time a reply was received advising that the premises were subject to control, but since the maximum rent was in doubt within the meaning of Rent Regulation 1, Sec. 166, the director should establish a maximum rent based on comparable housing accommodations. This opinion was forwarded to the Hayward Rent Office, with a request that the Area Advisory Board recommend

a maximum rental based on comparable housing under the provisions of Sec. 166 of Rent Regulation 1. The Advisory Board in turn informed the Rent Director that no comparable housing accommodations existed in Southern Alameda County and likewise recommended the decontrol of the premises. Their recommendation was forwarded to the Washington Office, where it was denied. (T.R. 115, 116, 120, 121, 122, 123, 124.) Before any further action could be taken the question became moot.

In June of 1952, the Appellees requested an opinion of an attorney who also served as a member of the Area Rent Advisory Board as to whether or not the premises were controlled and what if anything they should do. (T.R. 112.) They were informed that he was of the opinion that the master lease was not subject to control, but that they should register for their protection. Accordingly, on June 9, 1952, the master lease was registered with the Office of Rent Stabilization, Hayward Office. (T.R. 83.) The maximum rent was set forth as "see lease". At the same time Appellees asked that office what rents to collect and they were informed that they should collect the rent provided for by the lease. (T.R. 76, 77.)

Appellees likewise testified that they on at least two occasions requested the Hayward Office of Rent Stabilization to establish the rent to which they were entitled. On each occasion that office refused to do so. (T.R. 79.)

The Appellant registered the rooms in January, 1952, and the maximum rent established for the units collectively (per month) was \$6,864.00.

SUMMARY OF ARGUMENT.

It is conceded that the master lease was subject to control pursuant to the provisions of Sec. 39(c) of Rent Regulation 1. This concession leaves only one question to be resolved, specifically what rents were the Appellees entitled to collect.

ARGUMENT.

I.

THE MAXIMUM RENT FOR THE PREMISES CANNOT BE FIXED BY SEC. 93 OF RENT REGULATION 1.

The Appellant contends that the rents to which the Appellees are entitled is the first rent for the premises. He reaches this conclusion on the strength of Sec. 93, Rent Regulation 1, which provides:

“For housing accommodations not rented on the maximum rent date which are rented after the maximum rent date, the maximum rent shall be the first rent for such accommodations after the maximum rent date * * *”

If the construction urged by Appellant is correct then the maximum rent is zero. It is admitted that nothing was paid by the Appellant to the Appellees for the month of January, 1952, the first month of the term.

Appellant seeks to buttress his position by pointing to Sec. 130, Rent Regulation 1, which provides for one of the grounds upon which the landlord may petition for an adjustment of rent. The section reads:

“Varying rents. The rent on the date determining the maximum rent was established by lease or other rental agreement which provided for a higher rent at other periods during the term of such lease or agreement.”

This section is of no assistance to Appellant for it presupposes that a maximum rent has been established and *secondly by its terms it is not applicable to the present situation.* (Emphasis ours.) The section applies where the lease provides for higher rentals at other periods, but here it was possible for the highest rental to be the first rental. If for example the motel operated at capacity in the first period the Appellees would have collected \$6,864.00 minus \$500.00 or a total of \$6,364.00. Subsequent months could have produced less revenue and consequently a lower rental.

Appellant implicitly recognizes the incongruity of his position when he attempts to answer his own question, namely, what is the first rent? In answering this question he is forced to add a new term to the provisions of Sec. 93, Rent Regulation 1. Specifically he adds the term *paid*. The section itself refers not to the first rent paid but the first rent, which in this case is zero, a rental which not even this Appellant can accept.

Appellant then urges that if the first rent paid is not applicable, the first rent should be the formula “gross receipts less \$500.00”. To arrive at this conclusion, again additional material must be read into Sec. 93, Rent Regulation 1 upon which Appellant

relies. Certainly this is not justified by the Regulations, for the Regulations which subject these premises to control afford a specific and precise answer to the question here involved.

Sec. 166, Rent Regulation 1 provides the specific solution to the question presented to this Court. The section provides:

“Sec. 166. *Orders where facts are in dispute, in doubt, or not known.* If the maximum rent, or any other fact necessary to the determination of the maximum rent, or the living space, services, furniture, furnishings, or equipment required to be provided with the accommodations, is in dispute between the landlord and the tenant, or is in doubt, or is not known, the Director at any time on his own initiative, may enter an order fixing the maximum rent by determining such fact, or determining the living space, services, furniture, furnishings and equipment required to be provided with the accommodations which order shall be effective to establish the maximum rent from the effective date of regulation or date of first renting, whichever is later, but in no event earlier than July 1, 1947. If the Director is unable to ascertain such fact, or facts, he shall enter the order on the basis of the rent which he finds was generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date and, where appropriate, may determine the living space, services, furniture, furnishings and equipment included in such rent.”

It is clear from the lease itself that the maximum rent is in dispute, in doubt or not known. In addition

to the provisions as to the payment of rent the lease provides for the Appellant to pay taxes and insurance; sums neither known or knowable. Plus these factors rental payments were credited to the purchase price to be paid by Appellant for the premises. Thus the factual picture brings the problem squarely within the framework of Sec. 166, Rent Regulation 1.

II.

WHERE THE MAXIMUM RENT IS TO BE DETERMINED UNDER THE PROVISIONS OF SEC. 166, RENT REGULATION 1, AND THE RENT IS NOT SO DETERMINED THE LANDLORD IS ENTITLED TO THE RENTS COLLECTED.

A similar situation was presented to the Courts in *Rhodes v. Hanschl*, 94 F. Supp. 1009. There, landlord failed to register rented premises with the Area Rent Director at the beginning of the lease as required by the Housing and Rent Act of 1947, as amended, 50 U.S.C.A. Appendix, Sec. 1881 et seq. When the premises were registered a lower maximum rent was prescribed by the Director's order effective as of the next rent payment day. The Plaintiff contended that the failure of the Rent Director to make the order retroactive made the Regulation invalid because the tenant's claim can be defeated by inaction on the part of the Area Rent Director. The Court rejected this argument, stating:

“The Statute and Regulations made his rents tentative but not unlawful. Until the contingency of readjustment occurred, the tenant could have

had no course of action for recovery of any part of the rental exacted by the landlord.”

In addition the Court stated in substance that under these facts the rent stipulated in the lease remained the legal maximum until the lower maximum was prescribed by the Director’s order. Likewise that Court pointed out that the statute does not deal with refunds. It provides for the recovery by the tenant of “any payment of rent in excess of the maximum rent prescribed, that is an overcharge as distinguished from a refund.”

It follows therefore that since a maximum rent was not fixed Appellees are entitled to retain the rents collected by them.

Appellant seeks to avoid Sec. 166, Rent Regulation 1 by the following argument which appears on page 21 of his brief:

“If the Rent Director had fixed the maximum rent pursuant to Sec. 166, then the sec. and any determination made pursuant thereto would have been relevant. But, in this case, no order fixing maximum rent was ever made pursuant to Sec. 166 (T.R. 79, 80, 110, 123; Request for Admission No. 6, T.R. 37, admitted by Answer to Request, T.R. 39). Consequently it becomes the province of the Court to determine what the maximum rent was.”

There are two errors inherent in this argument. First that for Sec. 166 to be applicable a determination must have been made pursuant thereto. Thus

Appellant implicitly admits that Sec. 166 was the proper section to resolve the controversy, but since it wasn't employed it is now irrelevant. Therefore the maximum rent must be determined by Sec. 93 of Rent Regulation 1. This is a singular position, for by the terms of the two sections they are mutually exclusive. If Sec. 166 was applicable, which Appellant admits, then Sec. 93 is not applicable.

Secondly Appellant would have the District Court make a determination that the Rent Director failed to make and which, if he had made, could not have operated retroactively.

In *United States v. McCrillis*, 200 F. 2d 884, a case upon which Appellant places heavy reliance the Court stated:

“For cases where there is a dispute or doubt as to the facts necessary to the determination of a maximum rent, we can see that it was an appropriate exercise of the regulatory power, in aid of the orderly administration of the Act, for the Housing Expediter to provide after notice and hearing, for the administrative determination of such doubtful or disputed fact, so as definitely to fix the maximum rent, *for the future*, in accordance with that determination.”

The same Court at another place in its opinion said:

“An order of the sort here involved * * * could lawfully have effect only as fixing the maximum rent prospectively from the date of its issuance.”

Likewise in *Markbreiter et al. v. Woods*, 163 F. 2d 993, the Court held that the Rent Director could not

establish maximum rents retroactively and since controls were ended the question of prospective operation must be wholly moot.

Thus Appellant would have the Court do what the Rent Director could not have done. In this connection the attention of this Honorable Court is respectfully directed to full and very able discussion of this point in the Memorandum Opinion of the Honorable District Judge (T.R. 41-47) wherein the Court stated:

“Since the Area Rent Director failed to establish a maximum under Section 166 during the period of the application of rent regulations; since the rent control law terminated before the imposition of maximum rent—which could not have been made retroactive (*Markbreiter v. Woods*, 163 F.2d 993)—defendants argue that no ceiling existed. Accordingly, they assert that there could have been no payment in excess of a maximum rent prescribed and thus there could have been no overcharge.

“There is no controlling authority on this subject. In order to make applicable plaintiff’s legal theory that the *first rent* under the lease formula for the accommodations constituted the maximum under the terms of the regulations (Sec. 93 of Rent Regulation 1), it would be necessary for the Court to adopt, quite arbitrarily, a part of the lease, to the exclusion of the other rental provisions in the same document which was tailored to meet a specific landlord-tenant commercial relationship. Adoption of the formula requires the Court to implement the regulations and to conjecture as to their scope.

“It is conceded that no rent was paid the first month. Therefore, we must look to the lease for aid and assistance. The rental provisions cannot be segmented in order to fix a maximum. (Cf. OPA interpretation MR-I issued Jul. 7, 1942; Revised May 13, 1943; Pike & Fischer OPA Service Vol. 8, p. 200:1115.) This Court is in no better position than the Area Rent Control Director was when he was petitioned to make a determination. Nor has the Court factors of comparable rental conditions to look to for guidance.

“The precise problem does not involve abstract legal propositions, nor can it be disposed of by the application of the principles enunciated in *United States v. McCrillis*, 200 F.2d 884.

“The maximum rental not having been declared or fixed in the first instance either by administrative process or judicial sanction or decree, any action fixing a maximum rental of an amount less than that called for in the rental clause of the lease would in effect result in retroactive procedure wherein plaintiff would receive an unwarranted refund. *Rhodes v. Hanschl*, 94 F. Supp. 1009 at 1010.”

CONCLUSION.

All of the arguments cited in Appellant's brief appeared in the briefs and oral argument submitted by him to the United States District Court. These arguments and authorities do not, and cannot, meet

Appellees' contention that they are entitled to retain the rents collected by them from Appellant.

Therefore, the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
May 13, 1955.

Respectfully submitted,

MARVIN G. GIOMETTI,

JAMES P. SHOVLIN, JR.,

Attorneys for Appellees.

No. 14,601

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES B. DOYLE,

Appellant,

vs.

OLIVER A. FOX, J. E. PATTERSON and
COREY GABRIELSON,

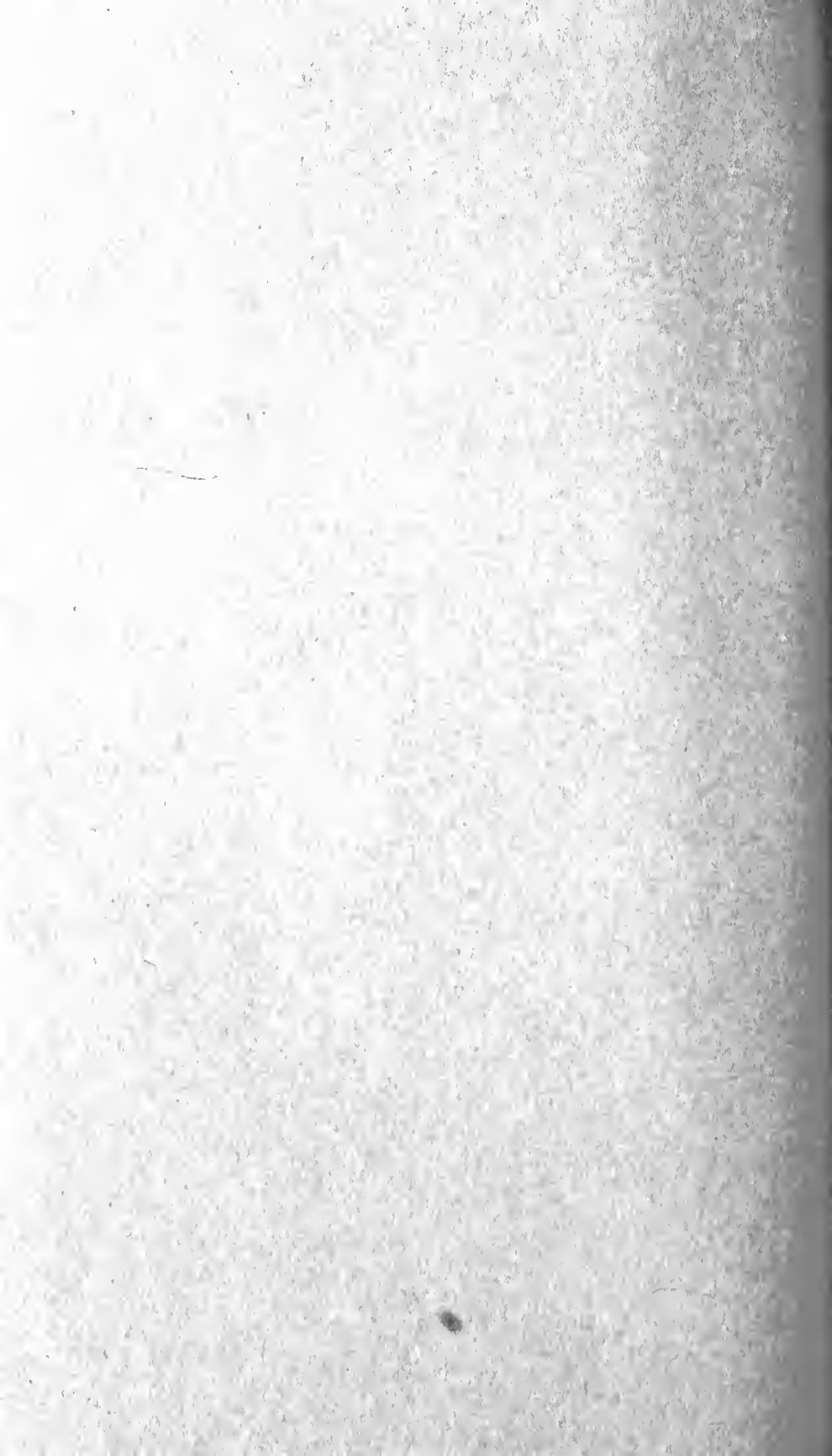
Appellees.

REPLY BRIEF FOR APPELLANT.

MALONE & SULLIVAN,
WILLIAM M. MALONE,
RAYMOND L. SULLIVAN,
WILLIAM J. DOWLING, JR.,
1120 Mills Tower, San Francisco 4, California,
Attorneys for Appellant.

FILED

JUN - 6 1955



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No. 14,601

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JAMES B. DOYLE,

Appellant,

VS.

OLIVER A. FOX, J. E. PATTERSON and
COREY GABRIELSON,

Appellees.

REPLY BRIEF FOR APPELLANT.

The appellees do not question the summary of evidence as set forth in the appellant's opening brief. They do purport to present certain "additional facts" which are, the appellant submits, in some respects immaterial to the controversy and in all other respects strengthening to the appellant's position.

Comment with respect to certain of the "additional facts" will be made in the course of this brief. However with respect to the appellees' recounting of their inquiries about the applicability of the Rent Regulations, appellant submits that the facts substan-

tiate appellant's position. From a time prior to the effective date of the lease, which was January 1, 1952, until May 1952, a period of five months, during which the overcharges occurred, the appellees made no inquiries at all. And this despite the fact that the appellee Gabrielson knew, in February 1952, that Parks Air Force Base in the vicinity of the motel, was being reactivated and there were articles in the papers dealing with the possible reestablishment of rent control in that area (Tr. 108, 109).

I.

THE MAXIMUM RENT FOR THE PREMISES WAS FIXED BY SECTION 93 OF RENT REGULATION 1.

Responsive to the above proposition, the appellees first set up a straw man and then try to knock him down. They say that if section 93 is applicable the first rent, and therefore the maximum rent, is zero. Not so. The first rent was the formula: gross receipts less \$500.00. The application of this formula produced the payment of no money the first month, because gross receipts were less than \$500.00. The application of the same formula produced the payment of \$175.00 the second month, because gross receipts were \$675.00. There was no dispute between the parties as to this, nor was there any doubt. The appellees did not seek to collect any money for January 1952 because, applying the undisputed and known formula, none was payable (Tr. 73). For the

month of February 1952 there was likewise no dispute or uncertainty and the sum of \$175.00 was paid and accepted (Tr. 89, 90). What appellees fail to discuss is that there was a departure from this formula commencing with the month of March, and a new formula, more burdensome on the tenant, and producing a higher rent, was applied in the months of March, April and May, 1952.

The mere fact that the lease provides for the more burdensome formula is no justification for the exaction of the higher rent. Section 71 of the regulations expressly so provides. Such a lease simply permits an application for adjustment under section 130, which application was never made (see Appellant's Opening Brief p. 16).

Appellees mention the purported obligation of the appellant to pay taxes and insurance (Appellees' Brief p. 7). But there was no obligation on the appellant to pay taxes or insurance at any time during his tenancy. Such obligation would not have commenced until October 1, 1952 (Plaintiff's Exhibit No. 1; Tr. 14) and the appellant's tenancy terminated at the end of September.

The matter of "rental payments . . . credited to the purchase price" (Appellees' Brief p. 7) is equally irrelevant. The lease contains an option to purchase (Plaintiff's Exhibit No. 1; Tr. 30). Under section 72 of Rent Regulation 1 any sums demanded or received for such an option in excess of the maximum rent are overcharges, except under very limited circum-

stances not existing in this case. Appellant does not understand that the appellees make any contention that the provisions of section 72 have been complied with and thus does not extend this reply brief with a full discussion of its provisions.

II.

SECTION 166 OF RENT REGULATION 1 DOES NOT ESTABLISH THE LAWFUL MAXIMUM RENT.

Appellees profess to see some inconsistency in the statement that section 166 would have been relevant if the Rent Director had made a timely order pursuant thereto. There is no inconsistency. If an order had been made pursuant to section 166 it would have been valid to fix the rent prospectively from the date of the order. *United States v. McCrillis*, 1st Cir. 1952, 200 F. 2d 884, so indicates. The same case holds, on the very issue then before the court, that in the absence of such an order the maximum rent is fixed by the applicable statute and regulations and it is the province and the duty of the court to ascertain the facts, apply the law and thus determine the maximum rent.

Appellees misconceive the function and purpose of section 166. Rent Regulation 1 is divided into eleven parts. Part 4 is entitled "Maximum Rents". It is under this part that maximum rents are fixed and it is this part which includes section 93. Part 5

is entitled "Adjustments and Other Determinations". Section 166 is in Part 5. It is not a method of fixing the maximum rent; it is a method of determining a fact or facts upon the basis of which the maximum rent is then fixed according to the rules set forth in Part 4 of the regulations. If there was a dispute about the facts, or if they were in doubt, *and* they could not be ascertained, only then could an administrative order have been made fixing rent prospectively upon the basis of comparable rents. In this case the facts are not in dispute. Appellees concede that in their brief. Section 166 has no applicability whatsoever.

The facts being undisputed, as appellees concede, it is impossible for them to argue that the court is unable to ascertain the facts and thus powerless to determine what was at all times the maximum rent by applying the law to those facts.

Rhodes v. Hanschl, U.S.D.C., E.D. Pa., 1950, 94 F. Supp. 1009, cited by appellees is not in point. In that case the maximum rent was fixed by the rent regulation at \$22.50 per week. The director made an order reducing that rent, but made it pursuant to proceedings instituted more than three months after registration of the rent by the landlord. Under the regulations such an order could not have retroactive effect. Under the regulations the maximum lawful rent was \$22.50 per week subject to the authority of the director to order a reduction. Until the order was made, \$22.50 per week was the lawful

maximum and the collection of that amount was not an overcharge.

Nor is *Markbreiter v. Woods*, Em. Ct. of Appeals, 1947, 163 F. 2d 993, in point. In that case the rent director purported to make a retroactive order pursuant to section 166. The Emergency Court of Appeals ruled that the director had no power to do so. It involved no determination of the maximum rent in the absence of a valid order, the nature of the proceedings being such as to require no such determination. The proceeding was one for declaratory relief to adjudge the order invalid. No action for overcharges was involved.

Appellant respectfully directs the court's attention to the discussion of *United States v. McCrillis*, supra, in Appellant's Opening Brief (pp. 22-24). It appears to be compelling and conclusive as to the appellant's contention that it was the province and duty of the trial court to find the facts (which are undisputed) and apply the law so as to determine the maximum rent.

CONCLUSION.

Appellees commence their argument by conceding that the premises were subject to control (Appellees' Brief p. 4). They then devote themselves to the illogically conceived task of trying to prove that the law provides no control over that which the statute and the regulations have at their very heart—the

matter of the lawful maximum rent. Appellant respectfully submits that the premises cannot be controlled and uncontrolled at the same time, as appellees are prone to argue.

Dated, San Francisco, California,
June 3, 1955.

Respectfully submitted,

MALONE & SULLIVAN,
WILLIAM M. MALONE,
RAYMOND L. SULLIVAN,
WILLIAM J. DOWLING, JR.,
Attorneys for Appellant.

No. 14605

**United States
Court of Appeals**
for the Ninth Circuit

FRANCIS L. SAUGET,

Appellant,

vs.

JOSE C. VILLAGOMEZ,

Appellee.

Transcript of Record

Appeal from the District Court of Guam,
Territory of Guam.

FILED

FEB 17 1955

PAUL P. O'BRIEN,
CLERK



No. 14605

United States
Court of Appeals
for the Ninth Circuit

FRANCIS L. SAUGET,

Appellant,

vs.

JOSE C. VILLAGOMEZ,

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Transcript of Record

Appeal from the District Court of Guam,
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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

FINTON J. PHELAN, JR.,
Suite 201-203, Mesa Bldg., Agana, Guam.
For the Appellant.

J. C. ARRIOLA,
Box 627, Agana, Guam.
For the Appellee.

In the District Court of Guam in and for the
Unincorporated Territory of Guam

Civil No. 55-54

FRANCIS L. SAUGET,

Plaintiff,

vs.

JOSE C. VILLAGOMEZ,

Defendant.

COMPLAINT

I.

Plaintiff is a citizen of the unincorporated territory of Guam and defendant is a citizen of the unincorporated territory of Guam. The amount in controversy, exclusive of costs and interest, exceeds the sum of Two Thousand (\$2,000.00) Dollars. This court has jurisdiction under the provisions of Section 1424(a) Title 48 USCA and Part I, Title I, Chapter II of the Code of Civil Procedure of the unincorporated territory of Guam.

II.

That the plaintiff is and has been since the 28th day of June, 1954, the owner and entitled to possession of that certain real property with the improvements thereon situated in the Municipality of Barrigada, unincorporated territory of Guam, and being known as and denominated as Lot No. 2288, Municipality of Barrigada, more particularly bounded and described as follows:

Commencing at a point marked "one" on plan, said point being South $33^{\circ}54''$ West 903.02 meters from Lola Monument No. 2; thence South $78^{\circ}34''$ West 111.77 meters to point No. 2; thence North $9^{\circ}42''$ East 67.79 meters to point No. 3; thence North $20^{\circ}31''$ East 10.41 meters to point No. 4; thence North $20^{\circ}34''$ East 22.21 meters to point No. 5; thence North $35^{\circ}34''$ East 99.53 meters to Point No. 6; thence North $51^{\circ}38''$ East 71.69 meters to point No. 7; thence South $7^{\circ}47''$ West 81.20 meters to point No. 8; thence South $7^{\circ}47''$ West 121.33 meters to the point or place of beginning.

less certain portions now held by the Government of Guam or the United States of America.

III.

That on the 1st day of July, 1954, a notice as set forth herein,

Notice to Quit

To: Jose C. Villagomez, Licensee of Jesus B. Untalan.

You will please take notice that the license under which you occupy a portion of the premises known as Lot No. 2288, Municipality of Barrigada, unincorporated territory of Guam, formerly owned by Jesus B. Untalan, which premises, by Deed of Sale, recorded on the 29th day of June, 1954, has been transferred to the undersigned, is, by this notice, terminated, and you are notified to remove from the said premises within the period of thirty (30) days from and after the 30th day of June, 1954.

You are further advised that the undersigned is now the owner of the said premises and that this notice is notice of cancellation of your revocable license, granted some time previously by the original owner, Jesus B. Untalan.

Dated at Agana, Guam, this 1st day of July, 1954.

/s/ FRANCIS L. SAUGET.

was sent by the plaintiff through the United States Mail, Registered Return Receipt requested, to the defendant herein demanding possession of the said premises.

IV.

That the defendant herein had been occupying said premises under an oral license for the purpose of farming, granted by the former owner, Jesus B. Untalan, which license was cancelled by the notice set forth in paragraph III above.

V.

That the property is valued in excess of Three Thousand (\$3,000.00) Dollars and has a reasonable rental value of Two Hundred Twenty-Five (\$225.00) Dollars per month.

VI.

That the defendant holds over and continues in possession of the said premises without the permission of the plaintiff and refuses to peacefully surrender possession.

VII.

That by reason of the unlawful occupancy of the

defendant, the plaintiff has been damaged in the sum of Two Hundred Twenty-Five (\$225.00) Dollars, the reasonable rental for the month of July, 1954, and the further sum of Two Hundred Twenty-Five (\$225.00) Dollars, the reasonable rental for the month of August, 1954. That the plaintiff will be damaged in the sum of Two Hundred Twenty-Five (\$225.00) Dollars for each month that defendant continues to hold and occupy the premises.

Wherefor, the plaintiff demands judgment for the restitution and possession of the property, together with triple rental from the first day of August until such time as possession may be restored, costs of suit and interest, and such other and further relief as to this court may seem just.

Dated this 12th day of August, 1954, at the city of Agana, unincorporated territory of Guam.

/s/ FINTON J. PHELAN, JR.,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed August 12, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant, Jose C. Villagomez, and answers the complaint on file herein as follows:

I.

Defendant denies that the subject matter in controversy exceeds the sum of Two Thousand (\$2,000.00) Dollars exclusive of costs and interest.

II.

Defendant denies each and every allegation contained in paragraph II of the complaint.

III.

Defendant admits the allegation contained in paragraph III of the complaint.

IV.

Defendant denies each and every allegation contained in paragraphs IV, V, VI and VII of the complaint.

V.

For a further defense, defendant states that he purchased the property in controversy from Jesus B. Untalan on or about the year of 1936. That he had been paying taxes for the said property since the year of 1936 up to the present.

VI.

Defendant further alleges that he had been in open, exclusive, uninterrupted and adverse possession of the said premises from the year of 1936 up until the present.

VII.

For a further defense, Defendant alleges that the Plaintiff himself admits that the conveyance, to him, if any, is subject to Defendant's use and occupancy of the premises.

VIII.

That the Defendant received the price or award, to the exclusion of Jesus B. Untalan, a certain por-

tion of this land which was settled and satisfied by way of stipulation.

Wherefore, Defendant prays for a dismissal of the complaint for costs of suit and for other and further relief as this Court may deem just and proper.

Dated this 31st day of August, 1954.

/s/ JOSE C. VILLAGOMEZ,
Defendant.

Duly verified.

[Endorsed]: Filed August 31, 1954.

District Court of Guam, Territory of Guam
Civil Case No. 55-54

FRANCIS L. SAUGET,

Plaintiff,

vs.

JOSE C. VILLAGOMEZ,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 7th day of October, 1954, before the Court, J. C. Arriola, Esq., appearing for the Defendant, and Finton J. Phelan, Jr., Esq., for the Plaintiff, and evidence both oral and documentary having been introduced, the case argued, and the cause submitted for decision, and issue having been

joined in this possessory action, and the Court being fully advised;

Wherefore, by reason of the law, it is Ordered, Adjudged, and Decreed that the Plaintiff take nothing by this action.

So ordered this 22nd day of October, 1954.

/s/ PAUL D. SHRIVER,
Judge, District Court, Guam.

Approved as to Form:

/s/ FINTON J. PHELAN,
Attorney for Plaintiff.

Approved:

/s/ J. C. ARRIOLA,
Attorneys for Defendant.

[Endorsed]: Filed and entered October 22, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Francis L. Sauget, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 7th day of October, 1954.

Dated at Agana, Guam, this 4th day of November, 1954.

/s/ FINTON J. PHELAN, JR.
Attorney for Plaintiff.

[Endorsed]: Filed November 3, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to Jose C. Villagomez, defendant, the sum of Two Hundred Fifty Dollars (\$250.00).

The condition of this bond is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed the 3rd day of November, 1954, from the final judgment of the District Court of Guam, entered in this action on the 7th day of October, 1954, if the plaintiff shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment and order is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

/s/ JOHN F. EAGAN,

/s/ FLOYD G. BLAKE.

Service of Copy acknowledged.

[Endorsed]: Filed December 6, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Plaintiff-Appellant herewith presents the points upon which he will rely on appeal.

I. The Court erred in not entering judgment for the plaintiff.

II. That the Court misconstrued the pertinent statute of the unincorporated territory of Guam.

III. That the judgment is contrary to and against the weight of the evidence.

IV. That the Court misconstrued the deed to the plaintiff.

V. That the Court erred in considering defendant's claim to hold title by adverse possession.

VI. The Court erred in not finally determining the issues.

/s/ FINTON J. PHELAN, JR.,
Attorney for Plaintiff-
Appellant.

[Endorsed]: Filed December 6, 1954.

[Title of District Court and Cause.]

Civil 55-54

MINUTES

9-10-54—Issues having been joined on August 31, 1954, Ordered case placed on the calendar for hearing on Friday, September 17, 1954, at 9:30 a.m., for resetting for Pre-Trial Conference.

9-17-54—Plaintiff appears by Finton J. Phelan, Jr., his attorney. Defendant appears by J. C. Ariola, his attorney. Having heard the remarks of the attorneys, Ordered case continued to Monday, September 27, 1954, at 1:30 p.m., for Pre-Trial Conference.

9-27-54—Pre-Trial Conference: Attorneys present. No written order. Ordered case set for Trial on Thursday, October 7, 1954, at 9:30 a.m.

10-7-54—Trial: Plaintiff appears in person and with Finton J. Phelan, Jr., his attorney.

Defendant appears in person and with J. C. Ariola, his attorney.

Thereupon comes the evidence on behalf of the plaintiff and certain documents marked Plaintiff's Exhibits I through V are offered in evidence without objection, accepted and filed.

Certain persons, to wit: Jose Laguana, Alfred Ching, Jesus B. Untalan and Francis L. Sauget, are duly sworn and testify.

V. B. Bamba was duly sworn by the Court as interpreter.

Question of jurisdiction of court arises and court rules that it has jurisdiction.

Plaintiff rests.

Thereupon comes the evidence on behalf of the defendant.

Certain persons, to wit: F. D. Flores, Juan L. Salas and Jose C. Villagomez, are duly sworn and testify.

Defendant rests.

Court finds the issues joined in favor of the defendant and against the plaintiff. Attorney for the defendant given ten (10) days in which to prepare the Findings of Fact, Conclusions of Law and Judgment for the defendant, settle with the attorney for the plaintiff and file same with the Court.

A true copy.

District Court of Guam, Territory of Guam
Civil Case No. 55-54

FRANCIS L. SAUGET,

Plaintiff,

vs.

JOSE C. VILLAGOMEZ,

Defendant.

Before: The Honorable Paul D. Shriver, Judge.

TRIAL

TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

FINTON J. PHELAN, JR.

For the Defendant:

J. C. ARRIOLA,

PALTING & ARRIOLA.

October 7, 1954; 9:30 A.M.

Trial to Court

Plaintiff present in court in person and with his counsel, Finton J. Phelan, Jr.

Defendant present in court in person and with his counsel, J. C. Arriola.

The Court: First order of business?

The Clerk: The matter of Francis L. Sauget vs. Jose C. Villagomez, coming on for trial.

The Court: Is the plaintiff ready?

Mr. Phelan: Yes, sir.

The Court: Is the defense ready?

Mr. Arriola: Yes, sir.

The Court: Very well, call your first witness.

Mr. Phelan: I have asked the bailiff to call him, sir, Mr. Alfred Ching. He is not here. Mr. Laguna. [2*]

JOSE C. LAGUANA

called as a witness hereby and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phelan:

Q. Are you, Mr. Laguana, an officer of the Department of Land Management, Government of Guam?

The Court: May I have the name?

A. Jose C. Laguana.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Jose C. Laguana.)

Q. (By Mr. Phelan): Are you with the Department of Land Management and an officer thereof of the Government of Guam? A. Yes, sir.

Q. As such do you have custody of the records?

A. Yes, sir.

Q. Mr. Laguana, have you certain of the records of the Department of Land Management here with you this morning? A. Yes, sir.

Q. The original records of the Government of Guam? A. Yes, sir.

Q. Does your department record all documents pertaining to real property?

A. Yes, that is true.

Q. Mr. Laguana, I ask you if you have with you a certificate of guaranteed claim to Jesus B. Untalan? A. Yes. [3]

Q. Covering Lot No. 2288, Barrigada?

A. Here is the certificate of guaranty claim covering Lot No. 2288, Barrigada.

Q. That is an official record of the Government of Guam? A. Yes.

Mr. Phelan: Is there any objection?

Mr. Arriola: No.

Mr. Phelan: If it please the court, may we offer this into the record and later substitute an official certified copy from Land Management?

The Court: The question always presents itself, of course, in these cases as to whether we can take into custody of the court, without the permission of Land Management, their original records. Obvi-

(Testimony of Jose C. Laguana.)

ously, it is satisfactory to the Court if the witness is permitted to release it.

Mr. Phelan: I have no intention of leaving the records here—just read it into the record and then introduce the certified photostat from the Government of Guam.

The Court: Well, of course, normally you don't have it introduced as an exhibit and then the original withdrawn to be replaced by a photostatic copy. rather than to read a document into the record when the document speaks for itself. You have no photostatic copy available?

Mr. Phelan: Not right now, no, sir. It will take a day or two to secure them from the Government of Guam. [4]

The Court: Will counsel stipulate as to what the record shows?

Mr. Arriola: Yes, sir.

The Court: Do counsel stipulate that this shows the title in the name of Jesus B. Untalan, is that correct, and what else does it show?

Mr. Phelan: Will you just read what that certificate shows?

The Court: Yes—just let me see it.

Mr. Phelan: Yes.

The Court: The parties stipulate that for present purposes there is introduced a document entitled "Certificate of Guaranty Claim," which recites that Jesus Blas Untalan has complied with all of the requirement to entitle him to claim full ownership in fee simple for certain property des-

(Testimony of Jose C. Laguana.)

igned by official survey as Lot No. 2288 at Lalo, Barrigada, Guam, that this certificate is dated January 27, 1932, and signed by E. A. Root, Governor of Guam; that the certificate has been recorded in Volume 9 of the records of guarantee claims in the Department of Records and Accounts, Naval Government of Guam, as No. 3526. The record further shows the recording of and release of certain mortgages and a certain deed of conveyance under date of June 21, 1948, to the Naval Government of Guam. It is understood that by an agreement of the parties a photostatic copy of this document may be introduced as Plaintiff's Exhibit No. 1.

Q. (By Mr. Phelan): Mr. Laguana, do you have in your [5] possession a warranty deed from Jose B. Untalan to one Francis L. Sauget?

A. Yes, sir.

Q. Do you have the official original copy?

A. Yes, sir.

Mr. Phelan: Any objection to introducing that?

Mr. Arriola: No.

Mr. Phelan: Will you show it to the judge?

The Court: Now again you have a copy.

Mr. Phelan: I have a carbon copy of the original, your honor, that has been recorded.

The Court: You agree that the copy may be introduced as a duplicate?

Mr. Phelan: Duplicate of the original.

The Court: That is marked Plaintiff's Exhibit 2 and in connection with Plaintiff's Exhibit 2 the record should show that the original of this docu-

(Testimony of Jose C. Laguana.)

ment was filed as instrument 027298 on June 29, 1954, at the Department of Land Management, Land Records Section, and that the original deed was signed by Jesus B. Untalan on June 28, 1954, and acknowledged before a notary public whose name is not entirely clear to the court.

Mr. Phelan: I believe that was Juan Muna.

The Court: Juan Muna. And the record will then show that the name of the notary public is Juan Muna, M-u-n-a.

Q. (By Mr. Phelan): Mr. Laguana, have you in your possession [6] with you in the mutual distribution contained in Volume 8, page 158, the mutual distribution of the old Untalan estate to Jesus B.—

The Court: Now before you proceed, Mr. Phelan, let me ask this question: Under the law of Guam as it existed when this title in the name of Jesus B. Untalan was recorded—in other words the *modus constat* system was that possession of such a certificate was *prima facie* title?

Mr. Phelan: Yes, your Honor, I believe it is.

The Court: To the land; I mean you aren't required to go back of that to show that the grantor had title?

Mr. Phelan: No, this instrument is the distribution of Mr. Untalan's father's estate and it would show not only this lot in question but the distribution to Mrs. Villagomez of the adjacent lot, 2289.

The Court: But are we dealing with the question as to whether Jesus Untalan was the owner? Now you have shown, under the laws of Guam, he

(Testimony of Jose C. Laguana.)

was the owner of this particular lot and that subject to a deed, which is not before the court at the moment, from the Naval Government of Guam, a formal conveyance, he was the owner and sold his interest to the plaintiff in this case. Now since those matters appear of record, is it not the obligation of the defendant to overcome them?

Mr. Phelan: We have that deed here from the Naval Government of Guam when he sold part of it and there is another deed [7] to convey another part.

The Court: I think that should be explained.

Mr. Phelan: All right. We don't have to put this in.

The Court: I don't see where in your case in chief you have any responsibility to go further than to show that the land was owned by the predecessor in title and that the land was conveyed to you.

Mr. Phelan: Well, if we need to we can put it in later. It might explain some of the confusion existing.

The Court: That is up to the defendant. .

Mr. Phelan: I will withdraw that question at this time.

The Court: Now did you want to question as to the Navy?

Mr. Phelan: There is the deed to the Naval Government of Guam, which shows on that certificate of title the conveyed part of this property.

The Court: The certificate of title itself, of course, doesn't indicate that.

(Testimony of Jose C. Laguana.)

Mr. Phelan: It shows there is a deed to the Naval Government of Guam. It didn't convey it all. We should introduce the deed to show that he had some left.

The Court: What I am pointing out is that the records themselves show that there was a conveyance prior to that to Mr. Sauget.

Mr. Phelan: I will show that now.

The Court: Yes, that is what I thought you would do. [8]

Q. (By Mr. Phelan): Do you have an official copy of a deed from Mr. Untalan to the Naval Government of Guam? I believe it is document 520 or 521. I believe you have both of those?

A. Yes, we have a full warranty deed of conveyance to Jose-Villagomez and Antonia Villagomez, husband and wife, and Jesus B. Untalan as parties of the first part and Naval Government of Guam as parties of the second part.

Q. What does it convey?

A. It conveys a portion of parcel—of lot No. 2288, Barrigada, containing an area of 14,409 square meters.

Q. And what does that other deed show?

A. The other deed shows Mr. Jose Villagomez and Antonia Villagomez, husband and wife, parties of the first part, and Naval Government of Guam, party of the second part, conveying that portion of Lot No. 2289, township of Barrigada, and containing an area of 9,896 square meters.

(Testimony of Jose C. Laguana.)

Q. Are there maps incorporated in those deeds?

A. Yes, sir.

Q. Would you show those to the court please?

The Court: Now showing those to me isn't going to clarify your record. You have to have testimony there, and if you prefer, copies of the maps showing that the property deeded here is not included in the property which was deeded to Mr. Sauget.

Mr. Phelan: It shows on these maps.

The Court: Well, that again—those are the [9] original records?

Mr. Phelan: Yes, we will stipulate them in and substitute photostatic copies.

The Court: Well, again, are the parties prepared to stipulate that the conveyances which were made to the Naval Government of Guam, are not involved in the property in this case?

Mr. Arriola: I thought so as during the pretrial I thought the plaintiff had purchased the land and the reversion. Now there is no reversion because the deed just mentioned is warranty to the government.

The Court: Well, what we are concerned with here are the rights as between the plaintiff and defendant now regardless of reversionary rights. Is the defendant prepared to stipulate that the land which was conveyed to the Naval Government of Guam out of Lot No. 2288, is not involved in the present controversy?

Mr. Arriola: In so far as notice is concerned, sir. That is our only defense in here. The deed was signed by the plaintiff, the defendant and by the

(Testimony of Jose C. Laguana.)

defendant's wife and that is part of our defense against the plaintiff.

Mr. Phelan: You missed the point of the court.

The Court: What I am asking now, Mr. Arriola, is whether the descriptions contained in these deeds to the Naval Government involve in any way the land in controversy here?

Mr. Arriola: For that purpose, no, sir. [10]

The Court: For that purpose, no. Very well, the record will show that the parties stipulate that while certain property was conveyed to the Naval Government of Guam, without determining the nature of that conveyance, that such property is not involved in that which is in controversy in the present suit.

Mr. Arriola: All right, sir.

Mr. Phelan: We will substitute photostatic copies of these instruments. Would the court care to look at the original?

The Court: I don't see that it is of any value since you stipulate.

Mr. Phelan: It might help visualize the picture since it is a map.

The Court: What I am concerned with is the land you claimed to have purchased; that is the crux——

Mr. Phelan: Yes.

The Court: Of the case here. The only purpose of introducing the other deeds and accompanying maps is to show that the notations and the deed or certificate from the Naval Government to Jesus B.

(Testimony of Jose C. Laguana.)

Untalan and that the conveyances mentioned did not include the land which is in controversy here.

Mr. Phelan: It did not convey the entire lot to the Naval Government of Guam; part of it was not conveyed.

The Court: Yes, that is exclusive, in other words, with the land with which we are concerned here. Now that brings us, doesn't it, Mr. Phelan, to where you have shown that Jesus B. [11] Untalan was the registered owner of certain land, that in 1948, he deeded a portion of that land and in 1954 he deeded land to the plaintiff in this case.

Mr. Phelan: I have one other question.

Q. (By Mr. Phelan): Mr. Laguana, did you check the records to see if there were any other instruments pertaining to this particular lot?

A. Yes, sir.

Q. Did you find any instruments?

A. No, sir.

Q. You have brought all of the instruments that you could find pertaining to Lot 2288, Barrigada?

A. Yes, sir.

Mr. Phelan: Your witness.

Mr. Arriola: May I see that map? Your Honor, I would like to introduce this map showing the description of the property in question.

The Court: That is the original record of the Government of Guam?

Mr. Arriola: If the counsel for plaintiff would stipulate as to a copy of this map——

(Testimony of Jose C. Laguana.)

Mr. Phelan: As a matter of fact that is a larger map than the one on the deed. I am perfectly willing, but we have already stipulated that the deed would be introduced and with it a copy of the [12] map.

Mr. Arriola: The same map?

Mr. Phelan: Same map.

Mr. Arriola: Yes, sure. Does the court wish to look at this map, sir?

The Court: This is the map——

Mr. Arriola: Showing Lot 2288-1, conveyance to the Navy.

The Court: Where does it come from? An original map of the Government of Guam?

Mr. Arriola: Is this the original or a copy of the map you have on file?

The Witness: May I see it? It's a copy of a map that we have on file.

The Court: That is the property of the Government of Guam?

The Witness: This is.

The Court: Do you have any objection to that being introduced in evidence?

The Witness: Well, no, sir.

The Court: Does the Government of Guam want this particular piece of paper back, because if it goes in the record they won't get it?

Mr. Phelan: You will give us that?

The Witness: Yes.

Mr. Arriola: It is up to the plaintiff to introduce it at this time. Do you want to?

(Testimony of Jose C. Laguana.)

Mr. Phelan: May I just examine it [13] carefully?

The Court: I think the defendant can have it marked for identification purposes, but they are not putting on their case now.

Mr. Phelan: It's the same map. I will offer it into evidence to show the location of the property sold to the Government of Guam and the remaining portions now in question, that being sold to the Government of Guam being colored in red and that being retained by Mr. Untalan at that time being colored in green.

The Court: Is that agreed?

Mr. Arriola: Yes, sir.

The Court: Very well, it will be received as Plaintiff's Exhibit 3.

Mr. Arriola: No further questions of this witness.

The Court: Thank you, Mr. Laguana, you may be excused. Call your next witness. [14]

ALFRED CHING

was called as a witness hereby and on behalf of the plaintiff, was first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phelan:

Q. Will you please state your full name, occupation and residence?

A. Alfred Ching, Real Estate broker, surveyor and contractor.

(Testimony of Alfred Ching.)

Q. Mr. Ching, are you familiar with Lot 2288, Barrigada?

A. Lot 2288 is quite a large lot; the lot that I am familiar with is 2288-1.

Q. Mr. Ching, is that the remainder of Lot 2288?

A. That is the remainder of Lot 2288.

Q. Did you appraise that remaining portion of that lot?

A. I went out on Tuesday and examined Lot 2288-1 and made an appraisal on it.

Q. Mr. Ching, will you tell us what your appraisal was based upon?

The Court: Now before Mr. Chin proceeds—I am a little bit confused. Are you talking about Lot 2288? That is the only evidence we have before us. He describes that lot as 2288-1.

The Witness: 2288-new-1. Every time a portion is cut off they assign a new number to the remaining portion that is cut off.

The Court: I see, very well.

Mr. Phelan: Will you continue, please? [15]

A. The appraisal value basis on 2288-new-1?

Q. What was your appraisal value of that lot?

A. I appraised the lot at \$2,135.00 based on \$2.50 per square meter.

Q. Mr. Ching, did you appraise just the land itself or did you consider any improvements?

A. No improvements whatsoever on the land, just the land itself.

Q. Did you cause a map of that particular portion which you appraised to be made?

(Testimony of Alfred Ching.)

A. Yes.

Q. Does it have the area and description?

A. The metes and bounds description; we computed the area and metes and bounds description.

Mr. Phelan: Any objection to that going in?

Mr. Arriola: Let me see it. No, sir.

Mr. Phelan: I offer this in evidence as Plaintiff's Exhibit 4. Have you any objection to its being introduced in evidence?

Mr. Arriola: No objection.

Mr. Phelan: May it be received in evidence, your Honor?

The Court: Without objection it will be received.

Mr. Phelan: This shows exactly the area that is in question.

Q. (By Mr. Phelan): Would you describe for the record how that lot is situated? [16]

A. The lot is situated at the corner of Routes 10 and 15. That is the Navy designation for the roads. Its frontage is 97 feet on Route 15 and 60 feet on Route 10. The total area of the lot is 858 square meters.

Q. Is there water and power to that lot?

A. There is water and power to the lot at present.

Q. Mr. Ching, are there any improvements situated on that lot?

A. There is a two-story frame dwelling on the lot, which is partially set on concrete columns.

Q. Could you estimate the reasonable value of that structure?

(Testimony of Alfred Ching.)

A. I had no opportunity to go into the house. I based my value from what I seen outside. I would say that the house would be valued about \$8,500.00.

Q. That house is on this lot?

A. As far as I can see.

Q. Did you have occasion to appraise the reasonable rental value of this property?

A. Without seeing the inside, the house with power and electricity and the usual conveniences of a house—I would say at the present rental market it would rent for about \$100 a month.

Q. What would the reasonable business rental value of this entire piece of property be?

A. Based on what rentals have been paid on Guam, I would [17] say a reasonable value—may I ask one question before I answer that? Will you base it on a lease or a monthly rental? There is a difference. Based on a month rental, it should rent at approximately \$75 a month; based on a leasehold, long term, it should rent for \$50 a month with taxes paid by the lessee.

Q. That is for business purposes. Would that include constructing business buildings by the lessee?

A. That would.

Q. Then the property has substantial rental value?

A. The property has substantial rental value.

Q. Are the two roads paved roads or dirt roads?

A. They are both paved roads.

Q. And the map which we just introduced was

(Testimony of Alfred Ching.)

prepared by whom? A. An engineering firm.

Q. And that faithfully represents the particular portion that you appraised?

A. Yes; it is the exact portion that I appraised.

Mr. Phelan: I have no further questions.

Mr. Arriola: May I see Plaintiff's Exhibit No. 4, please?

Cross-Examination

By Mr. Arriola:

Q. Lot No. 2288-new-1, Mr. Ching, shows an area of 858 square meters. Where did you get this computation?

A. We took the original lot 2288 and we took out the portion the Navy took out for condemnation and took out the portion [18] where Route 15 cut off and that is the exact balance left.

Q. And you valued this lot at approximately \$2.50 per square meter? A. Yes.

Q. Just what did you base your appraisal on?

A. Based it on the various sales made throughout the last year or so throughout the island.

Q. Not around that particular lot?

A. If you base it on Barrigada—I do not have the exact figures—but they sold for around \$700 to \$800, without improvements, in from the roadways.

Q. What is the size of those pieces?

A. Around 800 to 1,000 square meters and they were sold between \$800 and \$700 without any improvements at all.

(Testimony of Alfred Ching.)

Q. Now, you appraised this lot with the building on the lot, is that correct? A. Correct.

Q. At \$2.50 a square meter? A. Correct.

Q. Did you notice how deep the top soil was on this lot?

A. The top soil is not very deep, just a thin covering over.

Q. Were there any fruit or trees on the lot?

A. There were not too many fruit trees or bearing trees on the lot. [19]

Mr. Arriola: I have no further questions, sir.

Mr. Phelan: I have one or two questions.

Redirect Examination

By Mr. Phelan:

Q. Mr. Ching, did you appraise this based upon desirable or value as farm or business property?

A. I based my appraisal on what the property could be sold for today.

Q. And its possible use?

A. Its possible use.

Q. Is depth of top soil or number of fruit trees to be considered for business purposes?

A. No.

Mr. Phelan: No further questions.

Mr. Arriola: One question.

(Testimony of Alfred Ching.)

Recross-Examination

By Mr. Arriola:

Q. Is Lot 2288-new-1 located in a business, residential or farming section?

A. It fronts on a main street and in Guam the zoning laws do not prevent anyone from establishing a business.

Q. Are there businesses in that area?

A. About a block further, toward BPM there is a store, I think.

Q. That is the only business? [20]

A. Right.

Q. Are there any other houses around that lot?

A. There are several houses on both sides of the street.

Mr. Arriola: No further questions.

The Court: You may be excused, Mr. Ching.

Mr. Phelan: Mr. Jesus B. Untalan. May it please the court, Mr. Untalan's English is rather limited and Mr. Bamba has volunteered to interpret these few questions.

The Court: We are very happy to have Mr. Bamba serve as interpreter.

(V. B. Bamba, called upon to act as interpreter for the witness, Jesus B. Untalan, was duly sworn and translated all questions propounded in the English language to the Chamorro language and all answers given in the Chamorro language to the English language, as follows.) [21]

JESUS B. UNTALAN

called as a witness hereby and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows, through the interpreter:

Direct Examination

By Mr. Phelan:

Q. Will you please state your name, occupation and residence?

A. My name is Jesus B. Untalan, farmer by occupation, and residence, Mangilao, Barrigada.

Q. Mr. Untalan, did you own Lot 2288, Barrigada? A. Where is that part of Barrigada?

Q. Lalo, Barrigada, Price Road. A. Yes.

Q. Mr. Untalan, I show you Plaintiff's Exhibit 2, a deed, and ask you if this is a copy executed by you to one Francis L. Sauget?

A. Yes, I remember executing a deed in favor of Mr. Sauget for my property.

Mr. Phelan: This is already in.

The Court: Yes.

Q. (By Mr. Phelan): You were paid for that sale? A. Yes.

Q. Mr. Untalan, I show you a piece of paper here which purports to be a receipt for real estate taxes, and I ask you if that is a tax receipt from the Government of Guam to you [22] for taxes paid on this lot? A. Yes.

Mr. Phelan: May this be marked Exhibit 5? Any objection?

The Court: Plaintiff's 5? 1

(Testimony of Jesus B. Untalan.)

Mr. Phelan: Yes, sir. It is the same tax receipt we had at the pretrial conference. May it be accepted in evidence? I am offering it in evidence.

The Court: Any objection?

Mr. Arriola: No objection, sir.

The Court: It will be received without objection.

Q. (By Mr. Phelan): Mr. Untalan, did you ever sell any other portions of this lot, 2288, Lola, Barrigada, at any time?

A. No, I have never sold any.

Q. Mr. Untalan, did you several years ago convey part of it to the Government of Guam, part of the big lot, the original lot?

A. There was some portion that the government took over and the government was using it for farm purposes.

Q. Is that part of the agricultural farm today?

A. Yes.

Q. Aside from the portion taken for the agricultural farm was any portion taken of the original lot? Now for the record, by the United States or the Naval Government of Guam? A. Yes.

Q. The portion you sold to Mr. Sauget was that the remainder after these other pieces were taken from the original lot? [23] A. Yes.

Q. Did you ever lease that remaining portion to anyone? A. No, sir.

Q. Did you ever authorize anyone to construct a permanent structure on this portion?

A. Yes, somebody constructed a permanent structure but that property belonged to me.

(Testimony of Jesus B. Untalan.)

Q. Was that structure built with your permission?

Interpreter: He didn't answer me. May I clarify the question?

Mr. Phelan: Yes, please.

A. I didn't give anybody any authority to construct any permanent structure.

Q. Considering just the portion which you sold to Mr. Sauget, have you ever conveyed or sold any interest in that piece to anyone other than Mr. Sauget? A. No.

Mr. Phelan: Your witness.

Mr. Arriola: May I have Plaintiff's Exhibit No. 2, please, the deed?

Cross-Examination

By Mr. Arriola:

Q. I will show you Plaintiff's Exhibit No. 2 and ask you to identify this again, whether this is your deed to Mr. Sauget; I will just ask you whether you can identify that document, please? [24]

Mr. Phelan: Here is the original.

The Court: Well, you have admitted this is the copy of the original.

Interpreter: It doesn't have any signature.

Mr. Phelan: Then ask him if this is his signature.

The Court: Just ask him—you are referring to the reservation in the deed, aren't you?

Mr. Arriola: And for purpose of impeachment.

(Testimony of Jesus B. Untalan.)

The Court: Well, if you are dealing with the reservation——

Mr. Arriola: Yes, sir.

The Court: Well, then why don't you ask him if he remembers that was in the deed.

Q. (By Mr. Arriola): Mr. Untalan, you testified in the direct examination that you had never authorized anyone to construct or build on lot 2288, isn't that correct?

A. No, I didn't authorize.

Q. Mr. Untalan, when you signed that deed to Mr. Sauget you understood what you were signing?

A. I was conveying my property.

Q. Were you aware at the time you executed the deed that the deed contained a provision that granted verbal license to Mr. Villagomez to use the land?

Mr. Phelan: If it please the Court, I believe this is immaterial to the point at issue. I believe we are drifting away. [25]

The Court: Well, this thing is going to resolve itself into the question of what rights the defendant has, and I suspect that this is the conclusion we have to reach, so let us begin at the purpose of the reservation in the deed. The reservation, of course, speaks for itself. If it is sufficiently clear it explains just what was intended, and I suggest that you explore the prior existent situation, when the house was built, and what the circumstances it was built under, and so forth.

Q. (By Mr. Arriola): Mr. Untalan, do you re-

(Testimony of Jesus B. Untalan.)

member when Mr. Villagomez built or constructed a house on that lot, 2288?

A. I don't remember.

Q. You were the owner of this lot since when, Mr. Untalan?

A. Since the year 1904 when I purchased it.

Q. Was not this piece of property, Mr. Untalan, delinquent in taxes for a period of three years from 1933 to 1936?

A. No, it was never delinquent.

Q. And you did not authorize or you did not grant anyone to build a house on this lot?

A. No, I didn't give any license. They just went right in and constructed it.

Q. Did not the defendant, Mr. Villagomez, give you \$125 for this lot in 1936?

A. No, sir.

Q. How much were you paid for this lot No. 2288 by Mr. Sauget? [26]

Mr. Phelan: I think that question is irrelevant. The exhibit speaks for itself.

Mr. Arriola: There is the issue here as to whether the court has jurisdiction, sir.

The Court: We are getting into the field of equity, and I will overrule the objection. He may answer how much he paid.

A. \$1,000.00.

Q. Were you personally paid by Mr. Sauget?

A. Yes.

The Court: What is the consideration recited to be?

Mr. Phelan: "One dollar and other valuable considerations."

Q. (By Mr. Arriola): Now when you sold a

(Testimony of Jesus B. Untalan.)

portion or part of Lot No. 2288 to the Government of Guam in 1948 did not your sister, Mrs. Villagomez, and defendant Villagomez join you in the deed as grantors? A. No.

Mr. Arriola: No further questions.

Mr. Phelan: I have no questions.

Examination by the Court

Q. Mr. Untalan, who built the house on the land?

A. Villagomez.

Q. When did he build the house?

A. I do not remember the date.

Q. About what year was it?

A. I do not remember the year. [27]

Q. Was it after the war?

A. Long before the war. Long before the war the house was built.

Q. Did Mr. Untalan see the house being built when it was originally built? A. No.

Q. When did he first know that the house had been built? A. I do not remember.

Q. Has Mr. Villagomez lived in the house?

A. You mean right now?

Q. Yes. A. Yes.

Q. And was Mr. Villagomez living in the house when he sold the land to Mr. Sauget? A. Yes.

The Court: Any questions?

Mr. Phelan: I have several, your honor.

(Testimony of Jesus B. Untalan.)

Redirect Examination

By Mr. Phelan:

Q. Mr. Untalan, is not Lot 2288 adjacent to Lot 2289, which is owned by Mrs. Villagomez?

A. Right.

Q. Did you ever have the boundary line between those two lots surveyed?

A. There was a map but it was lost during the war and the [28] monuments were destroyed.

Q. Did Mr. Villagomez ever tell you he was building on your land?

A. No, he didn't ask me.

Q. Did he ever say on what lot he was building his house to you? A. No.

Q. Did he ever state that he was building on his wife's lot? A. No, sir.

Mr. Phelan: I have no other questions.

The Court: Any questions?

Mr. Arriola: No further questions.

The Court: Very well, the witness may be excused and the court will take a ten-minute recess.

(The court recessed at 10:40 a.m. and reconvened at 10:55 a.m.)

Mr. Phelan: Please take the stand, Mr. [29] Sauget.

FRANCIS L. SAUGET

the plaintiff herein, called as a witness hereby on his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phelan:

Q. Will you please state your name, address and occupation?

A. Francis L. Sauget, businessman and contractor, Asan.

Q. Are you the plaintiff in this case, Mr. Sauget? A. I am.

Q. Mr. Sauget, in June of this year did you purchase from one Jesus B. Untalan a piece of property located at Lola, Barrigada?

A. I did.

Q. Is that property known as Lot 2288?

A. Yes.

Q. Mr. Sauget, did you pay Mr. Untalan value and consideration for that property?

A. I did.

Q. Did you pay him in cash? A. I did.

Q. Did you know Mr. Untalan before you made this purchase? A. No, sir, I did not.

Q. It was a business transaction?

A. Strictly business transaction. [30]

Mr. Phelan: I have no further questions.

(Testimony of Francis L. Sauget.)

Cross-Examination

By Mr. Arriola:

Q. Mr. Sauget, how much did you pay for this lot? A. I paid \$1,000.00 for this lot.

Q. And did you search the records in the Department of Land Management prior to the execution of the deed?

A. I searched the land records and found Jesus B. Untalan to be the owner of the property in question and that is why I——

Q. Did you personally search the records?

A. I personally looked at the records.

Q. Did you personally notice the map of Lot 2288? A. I only saw one map.

Q. That map was dated 1947? May I have the map there, the blue one? I think it's Plaintiff's Exhibit No. 4. I will show you, Mr. Sauget, Plaintiff's Exhibit No. 3, and ask you whether that is the map you saw at the Department of Land Management? A. Yes, that is the map.

Q. And you bought 2288-new-1?

A. 2288 is the lot that I bought.

Mr. Phelan: The deed speaks for itself.

Mr. Arriola: May it please the court there was evidence introduced that the lot in question was 2288-new-1.

The Court: That was the testimony of Mr. Ching.

Mr. Phelan: We stipulated that the deed con-

(Testimony of Francis L. Sauget.)

veyed certain [31] rights in the remainder of 2288. The only part in controversy was the small portion, 88-1.

Mr. Arriola: That is the question I asked.

Mr. Phelan: No, it isn't. I think the deed speaks for itself as to what he bought and what he intended to be conveyed.

Mr. Arriola: The deed shows a tract of land containing 16,000 square meters. Now we come down to 858 square meters. What is the—the court is interested as to whether the house in question is located on the 858 square meters.

Mr. Phelan: I don't think that's an issue.

Mr. Arriola: Well, plaintiff brought out by his witnesses as to whether the building was on 2288 or 2289.

The Court: Mr. Ching's testimony was as to the reasonable rental value of the building and so forth.

Mr. Phelan: And also of the bare lot for business purposes, but on cross-examination I think he must stick to the questions brought on direct examination. If he wants to put his case on, let him put his own witness on.

The Court: Well, this deals with the circumstances surrounding the sale and since this is the plaintiff in the case, why he can be asked. Now what was your question?

Q. (By Mr. Arriola): I asked the plaintiff whether he had looked at that particular map now in his hands, Plaintiff's Exhibit No. 3, sir.

(Testimony of Francis L. Sauget.)

A. I did not look at this particular map before I made the [32] purchase.

Q. Did you look at any other map?

A. All I looked at was an area map showing 2288.

Q. That was not the map, though?

A. No, not until after.

Q. Mr. Sauget, I will show you the original copy of Plaintiff's Exhibit No. 3 and ask you whether this is the map you saw?

A. No, I never even seen that map before I made the purchase.

Q. What document or documents did you see, if any, Mr. Sauget?

A. The only document I seen was a land registration record.

Q. The title?

A. The title certificates on the suburban area of Barrigada.

Q. And you did not see this warranty deed from the defendant, his wife and Mr. Untalan to the Government of Guam?

A. I did not see that.

Q. Did you see the premises prior to the transaction?

A. I had never inspected the premises outside of knowing where the location was and where it was described to me and the area involved with the stipulation that the government had two takings, and I would recognize the government takings was

(Testimony of Francis L. Sauget.)

the only thing, and I did not know the exact amount of taking by the government.

Q. And you did not know either that it was a conveyance and not a lease? [33]

A. I did not know that. The records showed at that time, that I seen, it was a leasehold but I did know that there was a minimum of 558 square meters left in the property involved. That was what I was interested in.

The Court: 558?

The Witness: 858.

Q. (By Mr. Arriola): And when was the first time that you noticed that there was a building located on the lot you had just purchased?

A. When I went out and made an examination.

Q. Approximately how many days and weeks after you made the purchase?

A. It was the day I purchased the property. I went and looked at it after the deed was signed.

Mr. Arriola: No further questions.

Mr. Phelan: I have one or two questions on redirect.

Redirect Examination

By Mr. Phelan:

Q. Mr. Sauget, on cross-examination you were asked if you had searched the records on this property. Did you search to see if taxes were paid?

A. Yes, I found that taxes were paid on there. There was no lien on the property.

Q. Did the tax record show any improvements?

(Testimony of Francis L. Sauget.)

A. No, the tax records showed that it was a bare piece of [34] property.

Q. You were interested in a lot?

A. That is right.

Mr. Phelan: I have no further questions.

Mr. Arriola: No further questions.

Examination by the Court

Q. Where is the house that has been mentioned here? Is that on the 858 square meters?

A. After examination it was found to be on this here. Upon search of the tax records it shows that the house was erected and taxes paid on 2289, which was Antonia Villagomez. There is the house and lot shown on the records that I checked last week. The receipt states the house and lot on that one, but the other one shows no improvements in the record whatsoever, no place in the tax record.

Q. When was the first time you saw the house?

A. The day after Mr. Untalan signed the deed. I had no right on the property prior to that time. I didn't even know where the exact metes and bounds was outside that it bordered on the highway and Fadian Point, making it crossroads property.

Q. Did you purchase the property for investment or for what use?

A. I purchased the property to build my home and also to possibly put in a store some time similar to what we have in Asan because I have a lease, one and a half years left on the present [35] lease and

(Testimony of Francis L. Sauget.)

it will expire and no chance for renewal so I had to find other property to move and build my residence and business.

Q. Did I understand that you did not inspect the property to determine whether it was suitable to build a home?

A. Well, I knew the location. I had to pass it to go to Mr. Untalan's, that it was the corner of the road, Fadian Point and Barrigada Road.

Q. But you never made any physical inspection of the interior of the property?

A. No, I never made any physical inspection of it—only the location of the property.

Q. Have you seen the home since?

A. I have seen the home since.

Q. What kind of a house is it?

A. Well, it's a frame house built on concrete and partial concrete posts.

Q. How large?

A. Oh, I would say it is about 32 x 36. A lot of lean-tos have been added on there.

Q. Does the contract give any idea as to its value?

A. Well, I don't think it would be possible to sell the thing for over \$4,000.

Q. With the land?

A. Because for one reason it doesn't have any conventional type of construction. It seemed like it was built and then [36] something added to it, just spread out over the area it now covers. It doesn't

(Testimony of Francis L. Sauget.)

seem like there was any design in mind. Something like that there is not too much chance for resale.

Q. What in your opinion is the rental value of 858 square meters?

A. Well, the price they are asking right now for areas of that kind for my purpose they have been all the way from \$75 to \$100 for a lease. As soon as they find out you are a businessman and what you want to use it for they are out after you.

Q. You say \$100 would be the outside figure?

A. It would be the maximum figure, Judge.

Q. Do I understand then, Mr. Sauget, at the time you bought this property you thought you were buying land alone and you were not buying any improvements?

A. Well, there was no mention of any improvements at all when I purchased the property.

Q. And you didn't even know that any improvements existed on it?

A. It was not brought to my attention.

Q. And I presume it is also clear, is it, Mr. Sauget, that the only portion of this lot to which you would be entitled to immediate possession, under your understanding when the deed was given, is the 858 square meters?

A. That is right.

Q. Anything else would be reversionary? [37]

A. That is the reason why I think the scope of the deed was to cover the entire amount in case the government at any time decided to sell it back to the owners. The amount of the property involved—the person holding the deed would have first priority

(Testimony of Francis L. Sauget.)

of purchase and that was the reason why the whole thing was mentioned as a conveyance with the stipulation as according to the deed, it would recognize all claims, leaseholds and so forth to the government.

Q. In other words, what you intended by getting title to the additional property over and above the 858 square meters was simply to step into the shoes of the former owner in the event that the property would subsequently be sold? A. Yes, sir.

The Court: I have no further questions.

Mr. Phelan: No questions.

Mr. Arriola: No questions.

The Court: You may be excused.

Mr. Phelan: The plaintiff rests at this time, your Honor.

The Court: May I ask counsel whether I have jurisdiction over the evidence?

Mr. Phelan: I think you have.

Mr. Arriola: I don't think the court has any jurisdiction, your Honor. Both the plaintiff and his witness testified that the maximum rental value of this property is \$100.

Mr. Phelan: The value has been testified as well over [38] \$2,000.

Mr. Arriola: The value actually paid is \$1,000.

Mr. Phelan: We are not arguing it for rent. We are arguing for possession.

The Court: I am open for discussion to see if we can come to a meeting of the minds. This is an

action of ejectment; it is not an action to acquire title.

Mr. Phelan: There isn't any question of title.

The Court: In other words, the position taken by the plaintiff is that defendant is on his property and it is unlawful detainer.

Mr. Arriola: Unlawful detainer or ejectment we have 20 days to——

Mr. Phelan: Public Law 17, as I understand it, gives the court jurisdiction in two cases—when the value of the property exceeds \$2,000 or when the rental is \$200 a month.

The Court: Well, it doesn't say that, does it?

Mr. Phelan: I think the answer——

The Court: The jurisdiction of this court is, of course, in reverse in that it states that it is the jurisdiction of the Island Court in all proceedings of forcible unlawful detainer where the rental value is not more than \$200 per month. Now I don't think we have a rental value here of more than \$200.

Mr. Phelan: No, but the property in a way has been converted into title because the defendant has claimed title in his answer. [39]

The Court: That is what I am getting at, but your outside figure here is \$100 monthly rental on a leasehold basis. The language of the Act is "in all proceedings in forcible entry or unlawful detainer where the rental value is not more than \$200 a month and where the whole amount of damage claimed is not more than \$2,000."

Mr. Phelan: If it please the court, it's impossible in this type of action to set forth the dam-

age except make a claim for rent. Now if Mr. Sauget does not get his property I think there is no question, based on the evidence today, that he has been damaged in excess of \$2,000.

The Court: You have shown no such damage. Where have you shown such damage?

Mr. Phelan: If Mr. Sauget does not get his property he has been damaged to the value of it and the property is worth over \$2,000, and in this case I think the defendant by the form of his answer has converted this into an action where it is a question of title and the property is worth over \$2,000. The defendant claims he owns the property in his answer. May it please the court, this is a verified answer. In paragraph 5 he states he owns it and has been paying taxes on it. In paragraph 6 he claims he owns it by adverse possession.

The Court: He starts out by denying that the value is \$2,000.

Mr. Phelan: I think we have proven that the value is over [40] \$2,000.

The Court: You only paid a consideration of \$1,000. You made no investments, according to the evidence, on the land since then.

Mr. Phelan: He hasn't been able to get into it.

The Court: True.

Mr. Phelan: Well, as a matter of fact the purchase price has nothing to do with the actual intrinsic value of the property and I think that is the test. Any defense that is set forth by the defendant is set forth by way of an answer and not

by way of a cross-complaint. Under the federal rules I thought there was supposed to be a complaint.

The Court: All they ask for is dismissal of your complaint and for costs of suit. Now my problem, you see, therefore, is to find out whether the allegations in your complaint have been proven. We are dealing now with a *prima facie* case and it is a question of whether by reason of unlawful occupancy the plaintiff has been damaged in the sum of the reasonable rental for the month of July and the further sum of \$225, reasonable rental for the month of August. Now under your evidence here your damages would not exceed \$100 instead of \$225.

Mr. Phelan: My impression is that an allegation of jurisdictional amount made in good faith even though you are not able to prove it brings it within the jurisdiction of the court.

The Court: Well, rentals are somewhat different than the [41] problem we have in connection with a court action where a man's leg is broken and at the time action is brought you don't know whether he has permanent injury or not.

Mr. Phelan: This is not a case of a landowner trying to evict a tenant. It is the landowner trying to get a man off his land, and he is damaged by not having possession. He wants to use that land.

The Court: That obviously is something that can be tried under your general issue of eviction. Now what you ask for is the reasonable rental of the land for the period that the person is held over after the notice and that he be ejected.

Mr. Phelan: Yes, primarily we want him out.

The Court: I can see that an action properly framed might bring the matter within the jurisdiction of this court.

Mr. Phelan: Well, if the court feels that we haven't, I think we can amend the pleadings to conform with the evidence. Right now our action is to get back the property of over \$2,000 for the owner to use.

The Court: You are talking about property worth \$10,000?

Mr. Phelan: I said it is worth over \$2,000.

The Court: Well, didn't Mr. Ching testify this house was worth around \$8,500?

Mr. Phelan: Mr. Sauget testified \$4,000.

The Court: And the land, of course, has a minimum value of \$1,000 plus any increase it may have had since the time of [42] purchase. Now if that were the issue here I can see where the court would have jurisdiction.

Mr. Phelan: Does the court think——

The Court: But you have come into court alleging that you had a reasonable rental value of \$225 a month and you haven't proven that.

Mr. Phelan: Yes, but the property is worth over \$2,000 and we want the property.

The Court: That isn't the test here, is it?

Mr. Phelan: I think it is.

The Court: Hand that to Mr. Phelan.

Mr. Phelan: I think that under subsection 4 of Section 82: "In all cases at law under the laws of Guam in which the demand, exclusive of interest and costs, or the value of the property in con-

troverſy does not amount to more than \$2,000, except caſes which involve the legality of any tax, impoſt, aſſeſſment, toll or fine,”—I think there is no queſtion that the property is valued in exceſs of \$2,000.

The Court: The defendant iſn't aſking me to try title here. The only iſſue before me, under the pleadings, is who is entitled to poſſeſſion.

Mr. Phelan: No, if it pleaſe the court, we ſaid we owned it. The defendant came in and ſaid we didn't. Now if that iſn't a ſquare iſſue as to who owns it——

The Court: It is poſſible that you may own property [43] without being entitled to the right of ejectment in which event, ſince the Legislature has ſpoke here, the court has to determine whether or not, under your pleadings, the evidence on this *prima facie* caſe ſhows that you belonged to this court from the beginning.

Mr. Phelan: If it pleaſe the court, we can allege a rental value and if we do not have the proof at that time, it is ſubject to later proof. Now in an accident caſe a man may allege \$10,000 worth of injury and the proof may ſhow \$500, but this court would have juriſdiction. I do not think the juriſdiction is to be determined at the end of the caſe by what the proof finally comes out in the amount of damage.

The Court: Well, Mr. Phelan, if you follow that reaſoning, the court would always have juriſdiction at the will of any plaintiff who alleged that damages were in exceſs of \$2,000.

Mr. Phelan: If he does so in good faith, I don't think there is any question that it should go into this court.

The Court: When there has been color of title and color of right then the only way I can construe this litigation is in the light of federal ruling where there is a minimum of \$3,000.

Mr. Phelan: If it please the court, we have a different problem here than in any other federal court. Basically this court was given by the United States Congress all jurisdiction.

The Court: Yes.

Mr. Phelan: Therefore I feel that in construing the jurisdiction the rule of the constitutional district court should [44] not be strictly applied since the court, unlike the constitutional courts, started with all jurisdiction.

The Court: Started with all jurisdiction and then jurisdiction was transferred, as the Legislature had a right to do. In transferring jurisdiction the court said, "Well, now, you take anything over \$2,000 minimum and certain other matters and the other court anything up to \$2,000," and in connection with this type of action now we are agreed, surely, that this is an action of ejectment for unlawful detainer?

Mr. Phelan: No, the factors in a case like this then even with a rental value of \$5,000 a month it would be impossible to know whether this court had jurisdiction. How could one possibly seek in this type of case a trial before the District Court if

you must go beyond the honest allegations and brief of the plaintiff at the time of his action.

The Court: Well that statute says where the rental is \$200 a month, over \$200 a month.

Mr. Phelan: That is, if your honor please, where you have a tenant and an agreed rent. Here you have a case of a man paying no rent and the landlord wants him out.

The Court: I think that would be true if you had a controversy, but you don't have. Your own evidence shows that it was a maximum of \$100 a month.

Mr. Phelan: That is on the trial, but does your honor question this one fact that if I have a watch that you can buy [45] any place for \$25 and you want this watch and I say I will sell it for nothing less than \$100—in valuing the watch it would be \$25—but here is a case where the plaintiff owns this land. He says “I want that man to pay \$225 a month or get out.” There is no agreement as to what the rental is. He has a right to set any amount he wants because he doesn't want him there. He wants to use that property, and I think he has a right to set any price he wants and place it under the jurisdiction of this court.

The Court: Well, you set forth here that you are the owner of the property.

Mr. Phelan: I think we have proven that.

The Court: That the defendant is holding over.

Mr. Phelan: Yes.

The Court: That you have notified him to leave,

that he didn't leave and that you were damaged to the extent of \$225 a month.

Mr. Phelan: Yes.

The Court: As a reasonable rental value. All right, now, your testimony shows that the reasonable rental would not be more than \$100 a month.

Mr. Phelan: If it please the court, if there was a question of jurisdiction it should have been decided before the case was tried. If you take jurisdiction in an accident case and at the end of the case the defendant wins because there was no damage, would you then say you had no jurisdiction to hear the case [46] because he could prove no damage?

The Court: That isn't the question here.

Mr. Phelan: You are asking us before we file a complaint to prove the rental.

The Court: My problem in this case is how can I set a precedent under the terms of which a plaintiff could avoid the proper jurisdiction of the Island Court by the simple device of alleging a reasonable rental greater than \$200 a month? If the rental value of the land was only \$10 a month, you could still come into the District Court by simply saying it was over \$200, thereby circumventing the intention of the Legislature in the jurisdiction of these courts. Now if the defendant had come in here and said, "We own the land and we want title in us," because they want it as against this defendant then you would have a cross-complaint which would give the court jurisdiction. But all they are doing is setting up a defense to your action in ejectment.

Mr. Phelan: I won't say that claiming title is a defense. Under your reasoning, Judge, you are forcing the plaintiff to prove his case before he files his complaint.

The Court: No, I am forcing the plaintiff to prove his case by evidence the facts he alleges in his complaint.

Mr. Phelan: But to prove the evidence you must have jurisdiction.

The Court: I have jurisdiction now under the allegation. [47]

Mr. Phelan: Can you lose jurisdiction because you can't prove title?

The Court: Under this statute if the jurisdictional amount alleged is not shown by the evidence. The statute provides that when it appears—it doesn't say what portion—when it appears that the jurisdiction is not in that particular court then the court must transfer it to the other court. How many times have we ended up with cases of misdemeanors? Just last week the evidence alleged a felony; the proof showed a misdemeanor. All I could do in that case was to actually dismiss it.

Mr. Phelan: Well, if you didn't have jurisdiction you couldn't dismiss, could you, Judge?

The Court: I dismissed it for lack of jurisdiction.

Mr. Phelan: Well, I can't agree with you in your reasoning on the jurisdiction. If the complaint is alleged in good faith, I think you have jurisdic-

tion. What you can prove later—you might not prove anything.

The Court: Well, now, is it your reasoning, Mr. Phelan, that any time you want to try a forcible entry and detainer suit where the rental is not certain you can circumvent the jurisdiction of the Island Court by bringing it in the District Court?

Mr. Phelan: I don't like the word "circumvent." If, in good faith I allege the damage is sufficient, I think I have the right to bring it in the court with that jurisdiction. [48] I couldn't request this relief in the Island Court because on the face of it it is beyond their jurisdiction, and I don't have to rent my property to any individual for what the appraiser says it is worth.

The Court: I am not talking about that. I am talking about what you alleged.

Mr. Phelan: I alleged that it is worth \$225 a month and he should pay that for using it.

The Court: Yes, but the outside rental value is \$100.

Mr. Phelan: The basic thing is the value of the property to him. My Client doesn't want to rent the property; he wants the property itself, and if anybody is going to keep him from using it, he wants \$225 a month.

The Court: Your alleged value here of \$3,000.00 is clearly not inserted for any other purpose except to show the reasonable rental value.

Mr. Phelan: I beg to differ, Judge. I have to allege a financial amount to get into your court.

The Court: Well, that is \$2,000.

Mr. Phelan: I didn't allege \$2,000.

The Court: You alleged that the property is valued in excess of \$3,000 and has a reasonable rental value of \$225 per month.

Mr. Phelan: Yes.

The Court: Well, the only thing, frankly, that bothers me [49] here is where the defense of ownership in view of the allegations and clearly the allegation does show that the amount of the present value of the property is greatly in excess of \$2,000, and you have set up a defense of ownership of the property and the plaintiff—and I strongly suspect that if the matter were transferred to the Island Court, the Island Court would very quickly transfer it back to the District Court. If you continue with your defense of ownership, then you have to admit that the amount in controversy is in excess of \$2,000, don't you?

Mr. Arriola: Even assuming, your Honor, that the pleadings on the part of the plaintiff as good, as a motion to dismiss, but this is the plaintiff's case. He must show that *prima facie*, and he hasn't shown from the evidence that the court has jurisdiction of the matter.

The Court: Of course the court has to consider your answer, too. If your answer was simply that you were entitled to possession of the property, then I would agree with you. Then I would think it was simply a question of whether or not or who had the better right to possession of the property, but when you have alleged ownership and the plaintiff

has shown the value of the property as being in excess of \$2,000, I suspect it would just be wasting time in both courts if you transferred it. If you transferred it to the Island Court and attempted to establish ownership then the amount in controversy exceeds \$2,000 [50] and on motion would be returned to this court, so I raised the question and I will now hold that under the pleadings and evidence introduced by the plaintiff that the court has jurisdiction. Now do you have any other motion?

Mr. Arriola: No other motion. The plaintiff rests?

Mr. Phelan: Yes. [51]

JOSE C. VILLAGOMEZ

called as a witness hereby and on his own behalf, the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Arriola:

Q. You are the defendant in this case, Mr. Villagomez? A. Yes.

Q. Where are you residing, Mr. Villagomez?

A. Mangilao, Barrigada.

Q. Are you residing on Lot 2288?

A. Yes.

Q. Is your house situated on that lot now?

A. Yes.

Q. When did you first build or construct that house? A. In February, 1937.

(Testimony of Jose C. Villagomez.)

Q. Was that your land at the time?

A. It was supposed to be my land because I bought it from my brother-in-law somewhere in December, 1936.

Q. Who is your brother-in-law?

A. Jesus Untalan.

Q. The witness who testified for the plaintiff previously? A. Yes, sir.

Q. How much did you pay him for that lot?

A. \$125.

Q. Did you or have you had any written instrument pertaining [52] to the sale of that lot from him to you?

A. We didn't have anything written, but I have a witness when I give him the \$125 at his home.

Q. When you purchased that lot from Mr. Untalan, was that lot free of taxes as far as you know?

Mr. Phelan: I must request the court to ask the defense counsel not to do the testifying and ask the witness to verify his testimony.

The Court: That is correct. That is a leading question.

Q. (By Mr. Arriola): Mr. Villagomez, you are still residing in that house, are you not?

A. Yes, sir.

Q. Have you paid any taxes on that lot?

A. When I bought that land from Mr. Untalan, when I went to the Records and Accounts to pay the tax the following year at the same time I found out that I can't pay the year's tax from that date, because it has been delinquent for three years.

(Testimony of Jose C. Villagomez.)

Mr. Phelan: That is not responsive to the question. It has no bearing on it.

The Court: This is part of their defense, that they are owners of the land. Should they show ownership, out of the statute of frauds they are probably trying to show adequate consideration.

Mr. Phelan: The question was did he pay the tax. He can say "Yes, I did," or "No, I did not," It is cluttering up the [53] record.

Examination by the Court

Q. Who paid the tax?

A. I paid the tax.

Q. In what year?

A. In the name of Jesus B. Untalan.

Q. For what period of time?

A. Since 1936. I said I redeemed the delinquency for three years. Mr. Francis D. Flores was there and he issued me a statement according to the delinquent tax and the penalty due.

Direct Examination

(Continued)

By Mr. Arriola:

Q. And do you have in your possession any receipts for those taxes you paid?

A. I lost them during the war.

Mr. Arriola: No further questions.

(Testimony of Jose C. Villagomez.)

Cross-Examination

By Mr. Phelan:

Q. Mr. Villagomez, you said you paid taxes in the name of Jesus Untalan? A. Yes, sir.

Q. You said you bought it. Did you have a deed?

A. We do not have a deed.

Q. You do not have a deed. You never recorded any deed? A. Never recorded any. [54]

Q. Isn't it true that your wife owned the adjacent property next to it? A. Yes, sir.

Q. Isn't it a fact that you told Mr. Untalan that you were building your house on that lot?

A. Mr. Untalan helped us build the house there when I erected the house.

Q. Would you answer my question? Isn't it a fact that you told him that you were building your house on Lot 2289? How big is Lot 2289?

A. I do not know the exact measurements.

Q. Approximately?

A. Maybe about—the whole land is about close to three acres.

Q. And that wasn't big enough to build a house on?

A. We bought the land; it was the whole thing.

Q. You bought that land? A. Yes, sir.

Q. That land didn't come from Mrs. Villagomez' father's estate, Mr. Guzman? A. No, sir.

Q. You say there is not a record of the distribution to Mr. Guzman's heirs?

(Testimony of Jose C. Villagomez.)

Mr. Arriola: I don't think that has any relevancy.

The Court: What is your theory? [55]

Mr. Arriola: Well, the question is in controversy as to who has the better right.

The Court: Who has possession—the question here is who is entitled to possession.

Mr. Arriola: The old estate doesn't have any bearing.

The Court: Well, you don't deny, do you, that according to the records, Mr. Sauget is now the owner of the land in question? You have admitted proof without objection to that.

Mr. Arriola: No, sir, but this is estate land belonging to the estate of Guzman, which I never heard before.

The Court: But you put on evidence that the land is in the ownership of the defendant. Now counsel is examining as to whether that statement was made in good faith.

Mr. Arriola: I will withdraw my objection.

Mr. Phelan: Will you read that question back?

(The reporter read the last question.)

A. Who is this Mr. Guzman?

Q. (By Mr. Phelan): The question I asked was, you have denied that there is a record of the mutual distribution to your wife and her brothers and sisters of her father's estate and that it covered Lots 2288 and 2289? Juan Untalan Guzman—is he your wife's father?

(Testimony of Jose C. Villagomez.)

A. He is my wife's father.

Q. And you deny that it was through the mutual distribution of his estate that your wife got 2289 and Jesus got 2288? [56]

A. At first I didn't understand the name Guzman. What I know is Juan Untalan and not Guzman. Well, there was a distribution and my wife received that portion.

Q. Received what portion of land?

A. 2289. That piece before was only one piece and then it was divided by a road and I do not know what numbers they put.

Q. Now Mr. Villagomez, do you pay taxes on 2289? A. That is Untalan's property?

Q. Your wife's property? A. Yes, sir.

Q. Are you not paying taxes on a house on that property?

A. There is two small houses on the other side of the road on which I pay taxes.

Q. Aren't you paying taxes on the house where you are now living, as being on Lot 2289?

A. I paid tax but the lot was not included in it.

Q. Have you got tax bills to show that?

A. There.

The Court: His answer is that he pays taxes on the house, but the lot is not included.

Mr. Phelan: It is my understanding that the house is shown on 89.

Q. (By Mr. Phelan): Is that the tax bill?

A. Yes, sir.

Q. Is that the tax bill you paid? [57]

(Testimony of Jose C. Villagomez.)

A. Yes.

Q. That is your house? A. Yes.

Q. 2289 was typed in as the lot number?

A. And there is another one.

Q. Is that in your handwriting?

A. No, that is by Mr. Juan Salas. I wrote this down when I asked him about this land here, 770.

Q. Is not 2289 your wife's lot?

A. Yes, but there is no house on there.

Q. That is the tax bill you paid?

A. Yes.

Q. Mr. Untalan, or Mr. Villagomez, does it not value the land here at \$770?

A. I do not know how they put that, sir.

Q. Well, I am not asking you to explain how it got there. I am asking what it is. Doesn't it show what the land is worth and the building worth?

A. They were making a mistake. They are thinking this house was situated on 2289.

Q. I am just asking isn't that what the bill shows? A. I don't think so.

Q. Doesn't it say 770 land and doesn't it say 560 on improvements?

A. Yes, the house, but they are mistaken. [58]

Q. Well, we are not going into that. That is what this tax bill that you paid shows. Now you have no deed to this property?

A. Which property?

Q. Your brother-in-law's property?

A. No, sir.

Mr. Phelan: I have no other questions.

Mr. Arriola: No further questions.

(Testimony of Jose C. Villagomez.)

Examination by the Court

Q. When did you first pay taxes on 2288?

A. That is my wife's property or——

Q. Well, the present property where your house is.

A. I was paying taxes since 1936, sir.

Q. Since 1936? A. Yes, sir.

Q. But you say you always paid them in the name of Jesus Untalan?

A. In the name of Jesus Untalan.

Q. Now tell me—if you thought that you owned this land, why didn't you obtain title to it? Why didn't you obtain the deed?

A. I was but at that time I went to the court and I inquired of the clerk of the court to make a bill of sale and have it recorded in court and the papers was ready and every time I see my brother-in-law, he told me that he has no time to come down to sign the papers. [59]

Q. And what year was that?

A. That was in 1937.

Q. 1937?

A. Yes, sir, and every few months when I saw him again he still has no time until the war comes then everything closed up.

Q. Now was any farming done on 2288, Lot 2288?

A. Before the war?

Q. No, after the war.

A. The FEA occupies it—the whole land except a small portion where my house is.

(Testimony of Jose C. Villagomez.)

Q. And did you do any farming there?

A. Before the war?

Q. Yes. You farmed that land before the war?

A. Part of it, not all of it.

Q. Did Mr. Jesus B. Untalan do any farming on that land?

A. When he was occupying the land he farms a little, too.

Q. And when did he occupy it?

A. He was living there somewhere around 1935.

Q. Is it your testimony, Mr. Villagomez, the property was turned over to you about 1935?

A. 1936.

Q. 1936 the property was turned over to you?

A. Yes, sir.

Q. And that Mr. Untalan did not pay any taxes on the property since that time. [60]

A. I don't mean since that time but when I bought the land it was delinquent for three years. Mr. Flores was auditor at that time and he told me.

Q. What years were those?

A. That was 1936 when I come to pay the tax I paid for Mr. Untalan.

Q. You paid for '34 and '35 as well?

A. Yes, sir.

Q. And when did you pay over the \$125?

A. The early part of December.

Q. Of what year? A. 1936, the same year.

Q. And when did you start building your house?

A. On February, 1937. Before I bought this land

(Testimony of Jose C. Villagomez.)

Mr. Untalan moved away from that place and he lives in his other ranch. Then a man and woman called Aguan occupies this land before I bought it. Then when I bought this land from Mr. Untalan this woman and her husband was looking for another place to live because my brother-in-law told her already to find some place to live because I bought the land. I told this woman that it is not necessary for her to move until she could find a place to live.

The Court: Any questions, gentlemen?

Mr. Phelan: I have no questions.

Mr. Arriola: No questions.

The Court: Very well, the court will stand recessed until [61] 1:30.

(The court recessed at 12 a.m. and reconvened at 1:30 p.m.)

FRANCISCO D. FLORES

called as a witness hereby and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Arriola:

Q. Will you please tell your name?

A. My name is F. D. Flores.

Q. Your residence, Mr. Flores?

A. Agana Heights.

Q. Your occupation?

A. At the moment I am operating a little store up there.

(Testimony of Francisco D. Flores.)

Q. What did you do before that?

A. Government of Guam, assistant auditor of records and accounts.

Q. Were you occupying that position on or about 1936? A. I was.

Q. What were some of your duties at that time, 1936 to 1937?

A. Well, it embraced quite a number of duties there, among which were the registration of births, issuing of licenses, collection of taxes and the financial aspects of the Naval Government of Guam.

Q. When you said collection of taxes did that include collection of real estate taxes? [62]

A. Real estate taxes.

Q. Do you know the defendant here, Mr. Villagomez? A. I do.

Q. In the course of your official duties did you have the occasion to deal with the defendant with reference to Lot No. 2288, Barrigada?

Mr. Phelan: May it please the court, I believe the testimony which the defense counsel is attempting to produce is improper and cannot be admitted. I refer the court to Section 1855 (a) of the Code of Civil Procedure of Guam. Taxes and tax records are public records and speak for themselves. They cannot be proven by oral evidence and we are wasting the court's time to do so. This section says how and under what conditions it can be proven.

The Court: Well, we haven't reached that point yet, Mr. Phelan. Tax records, as we know, are public records and constitute the best evidence, but so

(Testimony of Francisco D. Flores.)

far the witness has not been asked to testify as to what is contained in a tax record.

Mr. Phelan: I can see no relevancy in any of his testimony.

The Court: Well, all questions to date are preliminary.

Mr. Phelan: I will reserve my objection.

Mr. Arriola: Please read the question back to the witness.

(The reporter read the last question.)

A. To the best of my recollection, knowing the defendant personally, I remember on one occasion when he came in to the [63] Records and Accounts and asked to redeem a certain lot in Mangilao, Barrigada.

Q. Did you keep any records for any transactions pertaining to redemption of lots?

A. At the time we did.

Q. Are those records still available?

A. I don't know because I left the office of Records and Accounts two years ago. I think the cash records where those payments were recorded, to the best of my knowledge, were still in.

Q. They were still in the Department of Records and Accounts?

A. In the Department of Records and Accounts.

Q. And will you elaborate the manner in which you dealt with the defendant pertaining to lot 2288?

Mr. Phelan: I must object to that on two grounds: He didn't say he dealt with him in respect

(Testimony of Francisco D. Flores.)

to that lot and the records will speak for themselves.

The Court: That is correct. His testimony is to the effect that the defendant negotiated with him in connection with the redemption of certain lots, but of course, Mr. Flores has not attempted to identify the particular lots involved.

Mr. Arriola: I asked him, sir, about Lot No. 2288, Barrigada.

The Witness: I am not in a position at the moment to remember the actual number of the lot, but in referring to the property [64] that was redeemed it was a certain piece of property in Mangilao, Barrigada. As to the number of the lot, I don't know.

Mr. Phelan: This testimony then is irrelevant and immaterial.

The Court: It may be cumulative. I will overrule the objection. The defendant has already testified that he did pay the taxes in 1936 on Lot 2288.

Mr. Phelan: The best evidence would be the records of the Government of Guam. I think in the absence of the best evidence——

The Court: The defendant has already testified and without objection he said he paid the taxes continuously in the name of Jesus Untalan.

Mr. Phelan: Yes, and the only tax receipt he produced was 2289.

The Court: Now Mr. Flores has testified to say that he knew the defendant and the defendant did redeem or pay taxes on some lot or lots in Barrigada. Now that, of course, is not——

(Testimony of Francisco D. Flores.)

Mr. Phelan: I believe Mr. Flores said he talked to him about the redemption of a lot, not that he paid it, but that he talked to him.

The Court: I think Mr. Flores said he paid some——

The Witness: As a matter of fact—may I?

The Court: Yes.

The Witness: He came in and asked for redemption of the lot, requested redemption of the lot in question, and I made out the proper—went into the proper procedure and prepared the [65] required tax statement at the time for redemption, and he is the one I remember coming in and got that statement from us and after turning that statement over to him, he went over to the cashier. I don't know if he paid it there. I told him to pay that at the proper window.

Q. (By Mr. Arriola): Mr. Flores, did you know who owned that lot? A. It was——

Mr. Phelan: I object to this. Who owned the lot is immaterial.

The Court: That objection is sustained. The ownership, the record ownership, as I understand it, by stipulation of counsel, was not in dispute.

Mr. Arriola: I just wish to corroborate the defendant's——

The Court: The record of ownership in 1936 was Jesus Untalan.

Mr. Phelan: Well, Mr. Flores has testified that he doesn't recall the number of the lot. How can we

(Testimony of Francisco D. Flores.)

discuss who owns the lot when he does not know which lot?

The Court: Whether he remembers or not it has no bearing on this at the moment because you have agreed as to the ownership of the lot.

Mr. Arriola: I have no further questions of the witness.

Mr. Phelan: I have one question. [66]

Cross-Examination

By Mr. Phelan:

Q. Mr. Flores, do you remember when Mr. Villagomez spoke to you what year it was?

A. To the best of my recollection I think that thing happened during the latter part of the year 1936.

Mr. Phelan: I have no further questions.

Examination by the Court

Q. It is your best recollection, Mr. Flores, that the records of tax payments for those years are still available in Records and Accounts?

A. I don't know at the moment.

Q. But that was your impression when you left Records and Accounts two years ago?

A. When I left Records and Accounts two years ago I am pretty sure that as far as the record of cash payments, I understand they are still there. Of course, they are not filed in the up to date filing, but it is somewhere around there.

The Court: Thank you very much, Mr. [67]
Flores.

D. M. SALAS

called as a witness hereby and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Arriola:

Q. Please state your name.

A. D. M. Salas.

Q. Your occupation?

A. Treasurer of Guam.

Q. How long have you occupied that position?

A. 29 years.

Q. Were you occupying that position some time during the year 1936?

A. No, as a cashier of the Naval Government of Guam.

Q. What were some of your duties as cashier of the Naval Government of Guam?

A. Just to collect the government revenue and the property taxes.

Q. Did that include real property taxes?

A. Right.

Q. Do you know the defendant, Mr. Villagomez?

A. Yes, sir.

Q. Did you have occasion to deal with him as cashier with reference to the payment of real estate taxes?

Mr. Phelan: I must object to that, your honor. The records [68] will speak for themselves.

Mr. Arriola: I haven't asked him about the contents of the records, your honor.

(Testimony of D. M. Salas.)

The Court: Yes, he asked whether he had occasion to deal with him with reference to the payment of taxes.

Mr. Phelan: Supposing he had. If the taxes were paid, let the records be produced.

The Court: I don't know what the next question will be.

Mr. Phelan: I think it's quite obvious, your honor, that this is an attempt to prove records by parol testimony instead——

The Court: Let us wait until we get to that. The witness will answer. The question is whether you had occasion to deal with Mr. Villagomez in connection with the payment of taxes.

The Witness: Beg pardon?

The Court: The question was whether you had occasion to deal with Mr. Villagomez in connection with the payment of taxes.

The Witness: I was collector at that time.

The Court: The answer is that you did.

Q. (By Mr. Arriola): Now did you keep any records in your dealings as tax collector at the time?

A. Oh, yes, I had a record in the cash book but all cash books were destroyed.

Q. Destroyed?

A. During the bombardment.

Q. Did the Government of Guam have any records pertaining [69] to the payment of taxes before the war?

A. Before the war, yes.

Q. Do you have that now?

(Testimony of D. M. Salas.)

A. No, all destroyed.

Q. To the best of your recollection, Mr. Salas, did the defendant personally pay any real estate taxes?

Mr. Phelan: I must object, your honor. I invite your honor's attention to the last sentence of Section 1855a on page 216, Code of Civil Procedure, regarding this attempt to prove the records no longer in existence: "Provided, nevertheless, that any party so desiring to use said evidence shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use the same at the trial of said action, and shall give all such other parties a reasonable opportunity to inspect the same, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof." If this is an attempt to prove lost records, they must be proven in accordance with the Code.

The Court: Let me see the Code.

Mr. Phelan: It starts at the bottom of the page and runs over to the top of the next page.

The Court: The objection will be sustained.

Mr. Arriola: Is that on the ground of the best evidence rule, your honor?

The Court: Under the best evidence rule and the provisions [70] of the Code. You must give notice in advance as to how you expect to prove from secondary evidence, "Any party desiring to use such evidence shall give reasonable notice in writing to all other parties to the action who have

(Testimony of D. M. Salas.)

appeared therein, of his intention to use the same at the trial of said action, and shall give all such other parties a reasonable opportunity to inspect the same, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof." Now in this case we have purely the memory of the witness. There is nothing you can examine.

Mr. Phelan: The section provides what secondary evidence will be admissible, abstracts, notes, and the preceding witness testified that two years ago these records did exist or a part of them.

The Court: Well, that is just Mr. Flores' recollection.

Mr. Phelan: Well, Mr. Flores testified to the fact that they did exist and I have personal knowledge that some of those records did exist four years ago when I was Assistant Attorney General of the Government of Guam. What state they are in I do not know, but I know some of them did exist.

Mr. Arriola: These are tax receipts, not records of any sort.

Mr. Phelan: I don't think we can take it as a blanket statement that all prewar records of the Government of Guam were destroyed. [71]

Mr. Arriola: Not the Government of Guam, just the cashier's.

Mr. Phelan: He doesn't know what records have been destroyed.

The Court: I must hold that there is not sufficient foundation at this time for the introduction of secondary evidence.

(Testimony of D. M. Salas.)

Mr. Arriola: Your honor, this witness has testified that these records were burned during the war.

The Court: He hasn't testified they were burned; he testified they were destroyed during the bombardment.

Mr. Phelan: Flores testified that they hadn't been destroyed two years ago and the war was over ten years ago.

The Court: He said he thought the cash books were still over there. I will sustain the objection.

Mr. Arriola: I have no further questions.

Mr. Phelan: I have no questions.

The Court: You may be excused, Mr. Salas.

Mr. Arriola: The defense rests, your honor.

Mr. Phelan: I don't believe that there is any question as to where record title is. However, one of the defenses which the defendant brought in here I would like to make a passing comment on. Section 1157.34 of the Civil Code of Guam states: "Title not acquirable by adverse possession. After land has been registered, no title there to adverse or in derogation to the title of the registered owner shall be required by any length of possession." With respect to the allegation of [72] adverse possession in the answer, I think that knocks that out. We have proven that the property was in the name of Jesus B. Untalan, a part was sold to the Naval Government of Guam of the United States, the remaining portion was sold to the plaintiff. The defendant has admitted receipt of the revocation of oral permit to use part of this land. We have shown title in the plaintiff and notice to quit. They have not

shown any right to use the land or any title adverse to the plaintiff. The only tax bill which Mr. Villagomez brought in this morning refers to a lot owned by his wife and admitted that covered the house. He has said he paid the taxes. We have produced a tax receipt, 1953, in the name of Mr. Untalan and Mr. Untalan said he paid it. The presumption is when a man's name is on a thing and he says he did it, he did. Mr. Villagomez himself testified that for 15 years he discussed the deed every two or three weeks but he hasn't got it yet. He has no deed, no title. He said he paid taxes but in the name of Jesus B. Untalan. I think beyond a doubt, beyond a reasonable doubt, plaintiff is entitled to possession of that property, including the house. If Mr. Villagomez has any recourse, I can't see that it can be against my client.

Mr. Arriola: May it please the court, I think there are sufficient documents with the Department of Land Management showing that defendant here has some right to the property, 2288, one of which is Exhibit No. 3, showing Lot 2288-new-1 [73] with the signature of Jose C. Villagomez. Another is the warranty deed from Villagomez' wife and Jesus B. Untalan to the Government of Guam for a portion or part of Lot No. 2288. I think it's sufficient notice to the plaintiff, plus the possession of the defendant on the lot itself, that that is sufficient notice that there was somebody on that lot and some claim to the lot.

Mr. Phelan: If the court please, the statutes

speak for themselves and Mr. Villagomez has no title to Lot 2289, either. That is the property of his wife as shown by the mutual distribution of the estate of Mrs. Villagomez' father, the father of Jesus B. Untalan.

The Court: Are you both through?

Mr. Phelan: Yes, sir.

Mr. Arriola: Yes, sir.

FINDINGS OF THE COURT

The Court: The court finds the issues joined in this case in favor of the defendant and against the plaintiff. The evidence in this case shows that a certain lot, No. 2288, in Barrigada was registered in the name of Jesus B. Untalan and was sold to the plaintiff in this case for a consideration of \$1,000. The amount of land actually available for use which had not been disposed of prior to this time was approximately 858 square meters. On that 858 square meters the defendant had constructed a residence in 1937, in February of 1937, and has testified without rebuttal, though Mr. Untalan is in the courtroom, that Mr. Untalan helped construct that house at the time [74] it was built. The defendant has testified that in 1936 he purchased the land in question for \$125, that he paid certain back taxes and that he continued to pay taxes on the land in the name of the registered owner but did not obtain title to the property. The plaintiff in this case has testified that prior to the time that he purchased the property he did not investigate the land nor go upon the land nor consult the defendant or in any

other way determine whether there were claimed rights adverse to those of Mr. Untalan. While this is simply an action in ejectment, the court is not required to try the title on this land. In this particular action it isn't required to determine as between these parties where title might rest in the appropriate action, but the plaintiff's own evidence has shown that with the improvements on the property, it had an actual value of from \$6,000 to \$10,000. Now this is only a few months ago and obviously a consideration of \$1,000 was completely inadequate to acquire property of that value, including the house which had been built. Also the plaintiff was on notice in the deed itself that there was an adverse claim, which the grantor called a license. The grantor is obviously an aged Guamanian who required the services of an interpreter, and the court seriously doubts whether he has the vaguest knowledge of what the word "license" meant in his deed. Certainly what he intended to do was to put the plaintiff here on notice that the defendant claimed the land adversely although [75] he thought it improper.

Mr. Phelan: May it please the court, I say he can't claim adverse——

The Court: The court will reach that. The defendant was in open and notorious possession of this land with no evidence to the contrary since 1937 when he built the house. He claims that that possession was built upon an oral agreement to purchase. An oral agreement in 1937 or '36 was not valid unless it was in writing and signed by the

person to be bound. The law of this jurisdiction is perfectly clear that partial performance and reliance upon an oral agreement and referable to the oral agreement takes the transaction out of the statute of frauds. Therefore, the court must find that in this action the plaintiff has not demonstrated that he has superior right to immediate possession of this land over and above the right of the defendant, who was in open and notorious possession under a claim of ownership and who had constructed a home of the present value of from \$4,000 to \$8,500; that the plaintiff was on notice that unless he made inquiry of the defendant or any one else in possession of this land prior to the time that he purchased the land, he was bound by any rights which existed. Any person who buys land is bound by the rights of persons who are in open and notorious possession of that land under claim of right. You can't just idly buy land with a house on it, people living in the house and so forth and then say, "Because the grantor [76] told me that you were a mere licensee you are estopped as against me from showing that you have something else." Any rights that this defendant may have had against a grantor he has against this plaintiff. Now in conclusion all I am saying is that in this action, which is purely possessory, I hold that at this time the plaintiff did not have any right to force the defendant to give up possession of his home and land. The court can but add this: The situation with which we are confronted here is not uncommon, especially when friendships and family relationships are involved.

It is not uncommon at all for people to build houses and live on the land in informal fashion. In 1936 the codes which had been adopted were of recent origin or prior to the adoption of a code, the Spanish civil law existed in Guam and it is my understanding that under the Spanish civil law it was quite possible to own a house or building affixed to land without owning the land, one of the things which were a peculiar but unfortunate practice that the people had, but I think I would be doing violence to the very concept of justice if I held that a person for a consideration of \$1,000 could force a man to give up what he has had since 1937 but has a present value of many times \$1,000. I therefore accept the defendant's version, that he is entitled to continued possession of this land in so far as this action is on the basis that he was in open and notorious possession under claim of ownership and that the plaintiff was on notice [77] to that effect. The defendant will prepare an order in this case and settle within ten days, finding judgment for the defendant. Any further questions?

The Clerk: No other matters, your Honor.

The Court: There being no further matters to come before the court, the court will stand adjourned.

(The court adjourned at 2:20 p.m., October 7, 1954.) [78]

District Court of Guam,
Territory of Guam—ss.

I, Dorothy L. Wilkins, Official Court Reporter for the District Court of Guam, hereby certify the above and foregoing to be a true and correct transcript of the stenographic shorthand notes taken in the above-numbered case at the said time and place as set forth.

/s/ DOROTHY L. WILKINS,
Official Court Reporter.

[Endorsed]: Filed December 6, 1954. [79]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam, for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint, filed August 12, 1954.
2. Answer, filed August 31, 1954.
3. Judgment, entered October 22, 1954.
4. Notice of Appeal, filed November 3, 1954.
5. Bond for Costs on Appeal, filed December 6, 1954.
6. Statement of Points on Appeal, filed December 6, 1954.
7. Designation of Contents of Record on Appeal, filed December 6, 1954.
8. Reporter's Transcript of Record, filed December 6, 1954.

9. All Exhibits, Plaintiff's Exhibits I through V, inclusive, filed October 7, 1954.

10. Certified copy of the Minutes.

are the original or certified copies of the documents filed in the above-entitled case.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Agana, Guam, M. I., this 10th day of December, A.D. 1954.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court.

[Endorsed]: No. 14605. United States Court of Appeals for the Ninth Circuit. Francis L. Sauget, Appellant, vs. Jose C. Villagomez, Appellee. Transcript of Record. Appeal from the District Court of Guam, Territory of Guam.

Filed: December 18, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,605

FRANCIS L. SAUGET,

Plaintiff-Appellant,

vs.

JOSE C. VILLAGOMEZ,

Defendant-Appellee.

ADOPTION OF STATEMENT OF POINTS RE-
QUIRED BY RULE 75(d) AND DESIGNA-
TION OF CONTENTS OF RECORD UPON
APPEAL

The plaintiff-appellant hereby adopts the designation of contents of record on appeal designated pursuant to Rule 75(a), Federal Rules of Civil Procedure, and statement of points required by Rule 75(d), Federal Rules of Civil Procedure, heretofore filed in this cause in the District Court of Guam on the 6th day of December, 1954.

Dated at Agana, Guam, this 27th day of December, 1954.

/s/ FINTON J. PHELAN, JR.,
Attorney for Plaintiff-
Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 30, 1954.

No. 14,605

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FRANCIS L. SAUGET,

Appellant,

VS.

JOSE C. VILLAGOMEZ,

Appellee.

**On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.**

APPELLANT'S OPENING BRIEF.

FINTON J. PHELAN, JR.,

Suite 201-203, Mesa Building,

First Street West, Agana, Guam.

Attorney for Appellant.

FILED

APR 15 1955

PAUL P. O'BRIEN, CLERK



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No. 14,605

IN THE
United States Court of Appeals
For the Ninth Circuit

FRANCIS L. SAUGET,

Appellant,

VS.

JOSE C. VILLAGOMEZ,

Appellee.

On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

This is an appeal from a final judgment of the District Court of Guam entered on the 22nd day of October, 1954. Jurisdiction to hear this appeal is in this court by virtue of the provisions of Section 1424 T48 U.S.C.A. The amount in controversy exceeds Five Thousand Dollars.

STATEMENT OF CASE AND QUESTIONS PRESENTED.

This action is an action for ejectment brought by the owner against a mere licensee, seeking recovery

of the use and possession of a parcel of real property situated within the unincorporated territory of Guam. The property originally owned and registered in the name of Jesus B. Untalan was by him conveyed to Francis L. Sauget by warrantee deed on the 28th day of June, 1954. This property is adjoining to a tract of land owned by the sister of Jesus B. Untalan, who is the wife of appellee herein. For many years the appellee had been, pursuant to an oral license without consideration from Jesus B. Untalan, permitted to use this land for farming purposes. Jesus B. Untalan received no rent, paid all taxes, and executed no deeds or written agreements. The deed to appellant, Sauget, was subject to this oral license for the purpose of advising him of its existence and to secure to appellee the necessary time to remove any personal property thereon situated.

A survey was caused to be made by the appellant, the new owner, and it was discovered, when the dividing line between the piece owned by the wife of the appellee and the piece conveyed to appellant was determined, that there was a house, constructed by appellee, which appellee had claimed was on his wife's property, situated on the piece now owned by appellant Sauget. Accordingly, appellant caused a notice terminating the license to use for agricultural purposes to be served upon appellee, demanding his removal within 30 days and the surrender of possession. The appellee refused to vacate the premises. Accordingly an action in ejectment was commenced on the 12th day of August, 1954 seeking possession

of the property and for triple rent pursuant to the codes of Guam for the period of the unlawful holding over. The appellee answered denying that the property was of a value within the jurisdiction of the District Court of Guam, claiming purchase of the property in 1936, that he had been paying taxes thereon since 1936, claiming to hold by adverse possession.

The action came on for trial on the 7th day of October, 1954 and the District Court of Guam, after assuming jurisdiction of the action, at the end of the case awarded judgment to the appellee. From this judgment, appellant has appealed claiming numerous errors.

The questions presented herein for review are:

1. Did the District Court err in giving judgment for the defendant.
2. Whether the court misconstrued the pertinent statutes of the unincorporated territory of Guam.
3. Whether the judgment was contrary to the weight of the evidence.
4. Whether the court misconstrued the deed to the plaintiff.
5. Whether the court erred in considering defendant's claim to have title by adverse possession.
6. Did the court err in not determining the issue of right to possession and title.

STATUTES AND RULES INVOLVED.*Civil Code of Guam***Section 732.**

Increase of property. The owner of a thing owns also all its products and accessions.

Section 789.

Termination of estates. A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed by Section 1162 of the Code of Civil Procedure, to remove from the premises within a period of not less than 30 days, to be specified in the notice.

Section 790.

Notice, effect. After such notice has been served, and the period specified by such notice has expired but not before, the landlord may reenter, or proceed according to law to recover possession.

Section 791.

Reentry generally. Whenever the right of reentry is given to a grantor or lessor in any grant or lease, or otherwise, such reentry may be made at any time after the right has accrued, upon 3 days' notice, as provided in Sections 1161 and 1162 of the Code of Civil Procedure.

Section 792.

Summary proceedings. Summary proceedings for obtaining possession of real property forcibly entered, or forcibly and unlawfully de-

tained, are provided for in Sections 1159 to 1175, both inclusive, of the Code of Civil Procedure.

Section 1013.

Fixtures. When a person affixes his property to the land or another, without an agreement permitting him to remove it, the thing affixed, except as provided in Section 1019, belongs to the owner of the land, unless he chooses to require the former to remove it.

Section 1047.

Owner ousted, may transfer. Any person claiming title to real property in the adverse possession of another may transfer it with the same effect as if in actual possession.

Section 1091.

Requisites for certain estates. An estate in real property, other than an estate at will or for a term not exceeding 1 year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.

Section 1157.34.

Title not acquirable by adverse possession. After land has been registered, no title thereto adverse or in derogation to the title of the registered owner shall be required by any length of possession.

Section 1157.35.

Transferee of registered land not required to inquire or affected with notice. Except in case

of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or any charge upon the same, from the registered owner, shall be held to inquire into the circumstances under which, or the consideration for which, such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand, or interest; and the knowledge that any unregistered trust, lien, claim, demand, or interest is in existence shall not of itself be imputed as fraud.

Section 1157.38.

Unregistered title does not prevail against title of registered owner. No unregistered estate, power, right, claim, contract, or trust shall prevail against the title of a registered owner taking bona fide for a valuable consideration or of any person bona fide claiming through or under him.

Section 1213.

Record of conveyances. Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the Director of Land Management is constructive notice of the contents thereof to subsequent purchasers and mortgagees.

Section 1214.

Nonrecorded void. Every conveyance of real property, other than a lease for a term not ex-

ceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action.

Section 1624.

What contracts must be written. The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: 1. An agreement that by its terms is not to be performed within a year from the making thereof; . . . 5. An agreement for the leasing for a longer period than 1 year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged; . . .

Section 1951.

Recording lease for real property. All leases of private real property for whatsoever term and conditions shall be recorded in the office of the Director of Finance. Failure to comply with this paragraph within 30 days after the date of any lease shall cause the lease to be null and void. A charge of 25 cents shall be made for recording each lease. Lands leased in any part of Guam may be used for the purposes of cultivation or stock farming, but the lessee shall

be responsible for any damage his animals or livestock may cause to crops or property of others, when such damage results from the lessee's lack of fences or failure to exercise proper care over said animals or livestock.

Section 3345.

Tenant willfully holding over. If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and 1 month's notice, in writing given, requiring the possession thereof, such person holding over must pay the landlord double rent during the time he continues in possession after such notice.

Code of Civil Procedure

Section 62.

Original jurisdiction. Under Section 22(a) of the Organic Act of Guam the District Court of Guam has the original jurisdiction of a district court of the United States in all causes arising under the laws of the United States and has original jurisdiction in all other causes in Guam except those over which original jurisdiction has been transferred to and vested in the Island Court by Section 82 of this title. If it appears that an action or proceeding brought in the District Court is actually within the jurisdiction of the Island Court the District Court shall transfer it to the Island Court for hearing and determination.

Section 320.

Entry on real estate. No entry upon real estate is deemed sufficient or valid as a claim,

unless an action be commenced thereupon within 1 year after making such entry, and within 5 years from the time when the right to make it descended or accrued.

Section 321.

Possession, when presumed. Occupation deemed under legal title, unless adverse. In every action for the recovery of real property or the possession thereof the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for 5 years before the commencement of the action.

Section 325.

What constitutes adverse possession under claim of title not written. For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure;
2. Where it has been usually cultivated or improved;

Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this code, unless it shall be shown that the land

has been occupied and claimed for the period of 10 years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, which have been levied and assessed upon such land.

Section 326.

Relation of landlord and tenant as affecting adverse possession. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of 5 years from the termination of the tenancy, or, where there has been no written lease, until the expiration of 5 years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods herein limited.

Section 735.

Damages in actions for forcible entry, etc., may be trebled. If a person recover damages for a forcible or unlawful entry in or upon, or detention of any buildings or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

Section 1160.

Forcible detainer defined. Every person is guilty of a "forcible detainer" who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the posses-

sion of any real property, whether the same was acquired peaceably or otherwise; or

2. Who, in the nighttime, or during the absence of the occupants of any land, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of 5 days, refuses to surrender the same to such former occupant.

The occupant of real property, within the meaning of this subdivision, is one who, within 5 days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

Section 1161.

Unlawful detainer defined. A tenant of real property, for a term less than life, is guilty of "unlawful detainer":

1. When he continues in possession in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be; including a case where the person to be removed became the occupant of the premises as a servant or employee and the relation of master and servant or employer and employee has been lawfully terminated, or the time fixed for such occupancy by the agreement between the parties has expired; but nothing in this subdivision contained shall be construed as preventing the removal of such occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the civil code.

2. . . .

3. When he continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, then the one for the payment of rent, and 3 days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there is a subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; Provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to said lessee or his subtenant, demanding the performance of the violated conditions or covenants of the lease.

A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant in case of his unlawful detention of the premises underlet to him.

4. Any tenant or subtenant, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall upon service of 5 days' notice to quit upon the person or persons in possession, be entitled to

restitution of possession of such demised premises under the provision of this chapter.

Section 1920.

Entries prima facie evidence. Entries in public or other official books or records, made in the performance of his duty by a public officer of Guam, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.

Section 1928.

Deed, evidence of transfer. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of Guam, acknowledged and recorded in the Department of Land Management, or the record of such deed, or a certified copy of such record is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed.

Section 1971.

Transfer of real property to be in writing. No estate or interest in real property, other than for leases for a term not exceeding 1 year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

Section 1973.

Agreements, when must be in writing. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents: . . . 4. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged; . . .

Federal Rules of Civil Procedure

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusion of law which constitute the grounds of its action. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and con-

clusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). As amended Dec. 27, 1946, effective March 19, 1948. . . .

SUMMARY OF ARGUMENT.

Appellant contends that the District Court of Guam was in error in giving judgment to the defendant rather than to the plaintiff. Appellant proved and it was not denied that title to the property in question was until the deed to appellant in his grantor, that the property was conveyed by warrantee deed to the appellant, that the appellee never had title and never had an interest of record in the property which is the subject matter of this action. That the court misconstrued the statutes of the unincorporated territory of Guam which provide that an estate at will—appellant had an oral license—may be terminated by thirty (30) days notice in writing. This was done. That the building built without permission becomes by statute in the absence of an agreement part of the land. No agreement was shown by appellee. That in any event an owner out of possession may convey his property. That by statute title or an interest could only be transferred by a written instrument—there was none to appellee, as he admitted. That title to registered land cannot be acquired adversely and must be transferred by a conveyance in writing. There was no

conveyance to appellee. That in any event the claim of appellee to title is barred by Section 320 of the Code of Civil Procedure of Guam as shown by appellee's own testimony.

That the entire weight of the evidence is against the judgment of the court. Mr. Untalan, the owner of a piece of registered land, could only be divested of title by operation of law or by his own deed. He executed this deed to appellant. Appellee by his own testimony never paid taxes on the land. Appellee did not pay rent for its use. Appellee produced a tax bill which covered the house situated on this land. This receipted bill showed that appellee had held out to the Government and presumably the public in general that the house was located on another adjacent lot. Appellee did not endeavor to correct this error if it was one. Yet appellee is an experienced business man of substantial interests. That the entire evidence showed that under the statutes of Guam the appellee can claim no rights in or to this property over and above the oral license, revocable at will, to use for agricultural purposes. No interest was ever granted to the appellee or acquired by him.

The court misconstrued the deed to appellant when it considered that there was any notice to appellant of an adverse claim or interest. An oral license is not a claim or an interest in real estate and is by its very nature revocable at will. Under the statutes registered land cannot be claimed adversely. The defendant's claim to hold title by adverse possession

is not a defense which in the circumstances can be considered since it is contrary to the express provisions of the statutes.

The court was in grave error when, without making finding of fact or conclusions of law therefrom, it did not finally determine the issues. Possession is one issue, but the court failed to determine the reasonable monthly rental value, determine the period of appellee's occupancy, if any, or determine who owned the property, all issues raised by the pleadings and before the court. The court should be reversed and instructed to enter judgment for the plaintiff.

I.

THE COURT ERRED IN NOT ENTERING JUDGMENT FOR THE PLAINTIFF.

The court was in error when it failed to give judgment for the plaintiff and acted contrary to the statutes and the evidence in this case. The issues and factual situation in this case are few and appellant contends are very simple. Jesus B. Untalan had for many years owned a parcel of land in the unincorporated territory of Guam. (Stipulation T.R. 16-17, Certificate of Guaranteed Claim No. 3526, 27 January 1932. Plaintiff's Exhibit No. 1.) It was admitted that this Lot No. 2288, Lalo, Barrigada, less certain portions conveyed or condemned previously and not herein of concern was conveyed, including the reversion of certain portions held by the

conveyance to appellee. That in any event the claim of appellee to title is barred by Section 320 of the Code of Civil Procedure of Guam as shown by appellee's own testimony.

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Government for highway purposes the title to which is inclusive, by warrantee deed to Francis L. Sauget on the 29th day of June 1954 by Jesus B. Untalan. This instrument was recorded in the Department of Land Management on 29 June 1954 as Instrument 027298 (Plaintiff's Exhibit No. 2, T.R. 17-18). Thus appellant contends that he has clearly shown that Jesus B. Untalan was the registered owner of Lot 2288, Lalo, Barrigada. (T.R. 21.) Jose C. Laguana, the custodian of the Land Records (T.R. 15), stated that he had examined the records, that Jesus B. Untalan was the owner of the lot in question, that there remained a portion untransferred which portion in 1954 was conveyed to appellant Sauget (T.R. 23). That all of the instruments affecting Lot 2288 were present in court. (T.R. 23.) A map showing the property in question, the portion sold to appellant shaded in green (Plaintiff's Exhibit No. 3), was introduced without objection. (T.R. 25.) Jesus B. Untalan, the original owner, a witness for plaintiff testified that he executed the deed to the appellant, that he never sold any portion though some was taken by the Government (T.R. 32-33), never sold any part or interest to anyone other than Mr. Sauget (T.R. 34).

Thus on the admitted facts and uncontradicted testimony we are presented with a clear cut legal question. Who, under the statute, owns the real estate and who is entitled to judgment. Appellant contends that upon the uncontroverted facts when the statutes are considered it is clear that the court

was in error when it entered judgment in favor of the defendant. The Civil Code of Guam controls and the following section clearly sets forth the answer. Appellant contends the law is clear. Sections 732, 1047 pp. 4, 5 ante clearly determines title to the building. Sections 789-792 p. 4 ante gives the rule for termination of the license and remedies thereunder. Section 1091 p. 5 ante sets forth the requirement of an instrument in writing to convey this title. Sections 1157.34, 1157.35 and 1157.38 pp. 5, 6 ante clearly forbid loss of title to registered land by adverse possession and further state that the grantee is not charged with the duty to make any inquiries as to adverse claim or other interests. The defendant could not prevail against the appellant in view of Sections 1214, 1624, 1951, pp. 6-7 ante. Clearly from the evidence in this case when compared with the Statutes of Guam, but one conclusion could or should be drawn. Jesus B. Untalan was the recorded and registered owner of the land in question. His title could not be defeated by adverse possession, title to registered land could only be transferred by a written instrument. Mr. Untalan conveyed his land to the appellant Sauget by a written instrument. The instrument was recorded. Mr. Villagomez, the appellee, had no written instrument. He had a permit, license or use at will. This could not ripen into more. There was no interest. The grantee from Mr. Untalan was not charged with making any inquiry. He did what the statute provides. He checked the certificate of registration, he then purchased.

A license can be terminated by a notice of revocation. This notice was given in compliance with the statute. Mr. Villagomez was required to vacate. He did not do so. Appellant contends that the court was in error when it failed to enter judgment for the plaintiff.

II.

THE COURT MISCONSTRUED THE PERTINENT STATUTES OF THE UNINCORPORATED TERRITORY OF GUAM.

The court failed to recognize the fact that in this factual situation the question of adverse possession of any right in or to this property could not arise. This is clear from the statute. This was registered land and title is governed by the Registration Act. (Testimony and stipulation, T.R. 16, 17; Sections 1157.34, 1157.35, 1157.38 ante.) Thus evidence permitted by the court in support of the defendant's claim to have title adversely, to have purchased by an oral agreement, to have perfected his title by proscription are clearly outside the permissible issues of this case.

Appellant contends that the only question the court could consider was whether there were any rights acquired prior to the deed to appellant Sauget which precluded his deed from being effective. If not the other issue, did Sauget give notices in compliance with the statutes—appellant contends that this fact is admitted by the pleadings and proven by the evidence of Sauget. This being so, the final ques-

tion was the damages for holding over and when possession should be delivered to Sauget.

Rather the court considered evidence allegedly supporting the flimsy claim of adverse possession, of purchase orally, of payment of taxes yet in the name of Jesus B. Untalan. The only tax bill defendant Villagomez produced was on the adjoining lot and showed the house to be situated on that lot. Would a search of any records show the actual facts. Appellant believes not. (T.R. 65-67.) The court failed to construe the meaning of a license in accordance with the plain intention of the statute.

Appellant contends that the intent of the Land Registration Act and the related statutes respecting real estate is plain and that the prime purpose of these sections is to avoid and preclude such actions as this one and to bar this type of defense. Everyone is presumed to know the law. Registration of land is conclusive. The public records are notice to every one.

The court erred in considering, once the fact of registration was established, any evidence contrary to the statute which tended to impeach title.

Therefore, appellant contends the court erred, that the case should be reversed and the court directed to determine damages and enter judgment for the appellant.

III.

**THE JUDGMENT IS CONTRARY TO AND AGAINST THE
WEIGHT OF THE EVIDENCE.**

Appellant contends that having established the fact of the land in question being registered, that there was no conveyance of the piece to anyone but appellant Sauget. Any evidence tending in any manner to impeach his title or to diminish it is incompetent and cannot be considered and that the fact of title being in Sauget is conclusive. This cannot be contradicted. The evidence of the defendant as to building the house, the alleged oral contract, the payment of taxes, always in the name of Jesus B. Untalan, are not competent to alter the fact of title and as to Mr. Sauget shall not have been considered. The court seemed to consider implied fraud or some type of estoppel. However, since fraud was not pleaded as a defense under the Federal Rules it cannot be considered. In any event it would not be that of Mr. Sauget. He, in accordance with the statute relied upon the certificate of title. Surely one need do no more than comply with the law. When the immaterial and incompetent evidence is disregarded and alone the competent evidence considered, it is clear that it was established conclusively that Mr. Sauget was the owner of this property, that he has the right to possession and that the only undetermined fact is the proper measure of damages.

If the court had prepared or caused to be prepared findings of fact and conclusions of law the fact would

have been clear. The court, had it considered proper findings of fact, would not have fallen into the error.

Appellant contends that the judgment is contrary and opposed to the competent evidence and is based upon evidence entitled to no weight and should be reversed.

IV.

THE COURT MISCONSTRUED THE DEED TO THE PLAINTIFF.

The deed to the plaintiff, T.R. 17. Plaintiff's Exhibit No. 2. A full covenant warranty deed does contain a recital of an oral license to the appellee Villagomez. However, the court construed this to be an estate or an interest in the land. In this the court, appellant contends, was in error. First and foremost appellee denies that he had a license. He claims ownership. Ownership cannot be proved or acquired either by an oral agreement to sell even if such were the fact, or by adverse possession. In both instances the statutes of Guam preclude such proof in the matter of registered land as here under consideration. The appellee claims no lease. Of course a lease is void unless in writing and recorded if for over one year. Thus, lease is not in issue. From the terms of the deed and the evidence at the trial, what could appellee have? Appellant claims either a license or he was a trespasser. No allegation of trespass was or is made. Appellee had a mere license. Yet the deed being a warrantee deed, the

oral license which under the statutes requires a thirty day notice to quit and therefore constitutes an encumbrance, to avoid a breach of warranty had to be recited. Can this recital convey any interest in the land to appellee. Is not the proper and only construction which the court could place upon this provision that it constituted notice to the appellant of the oral license and that whenever he desired to terminate it he should give the required notice. Appellant claims that the court was in error in holding that this clause did more than advise him of the fact that there was a licensee in possession. That it did no more than tell him that to obtain possession he had to revoke this license, as he did.

V.

THE COURT ERRED IN CONSIDERING DEFENDANT'S CLAIM TO HAVE TITLE BY ADVERSE POSSESSION.

Adverse possession can only be perfected and ripen into title which may be perfected in accordance with the provisions of the statutes. Adverse possession is a fictitious transfer of title from one person to another without consideration and as a matter of public policy. It is not created for the purpose of depriving a man of his property for the benefit of a wrong-doer and must be in strict compliance with the statutes. It cannot be pled as a defense neither can it be perfected except in those instances where the statute permits.

This land, herein concerned, is registered land. None can obtain title adversely to registered land. (Sections of the Civil Code 1157.34, 1157.35, 1157.38, pp. 5, 6 ante.) These sections clearly preclude any attempt to establish title except by deed. Therefore the court erred in permitting the appellee to introduce any evidence on this defense and is in error when it considered this defense to be of any validity in this case. Further, the appellee holding under a license cannot hold adversely to the grantor of the license. The testimony of appellee and his witnesses (T.R. pp. 59-66, 68-74), fails to show other than the appellee was not claiming title but was holding under and from Mr. Untalan. Surely this is not competent evidence to establish title.

The appellee did not in any event meet with the requirements of Sections 320, 321, 325, 326, of the Code of Civil Procedure, pp. 8, 9, 10 ante, under which he could claim if at all to have title by adverse possession.

Appellant concludes therefore that the court erred in considering the defense of adverse possession and the testimony of appellee and his witnesses except as admissions of appellant's title.

VI.

**THE COURT ERRED IN NOT FINALLY DETERMINING
THE ISSUES.**

In this case appellant claims that all the material facts and issues were before the court. The court did have jurisdiction. All issues were clearly raised by the pleadings. Namely, appellant claimed ownership, that the appellee was a mere licensee, that his license was revoked in accordance with the statute. That appellant was entitled to possession. That the reasonable rental value was \$225.00 per month and that for wilfully holding over he was entitled to triple rental as damages.

Appellee claimed ownership, both by oral purchase and by adverse possession and claimed the right to possession. Clearly all issues were before the court. It was admitted that title was and is in appellant Sauget. The statutes preclude defendant obtaining title adversely since the land was registered, a fact stipulated. The statutes declare void an oral sale of land. The actions of the appellee as he himself testified are inconsistent with a claim of ownership.

The issues appellant claims are simple once his title was admitted. What was the measure of damages for holding over and when was he entitled to possession. The oral opinion of the court assumes duties and obligations upon the part of the appellant which are contrary to the express provisions of the statutes, set forth ante.

This is an action of ejectment and the issues are clearly threefold, title, damages and possession. Adverse possession is not and cannot be an issue here.

The court having found title to be in appellant erred in not deciding the remaining issues of this case, all matters within the jurisdiction of this court and all raised by the pleadings. Rather, the court preferred to rest its findings upon some theory of adverse possession without title and contrary to the statutes.

The court rather than leaving an action within its jurisdiction and before it in an inconclusive state should have found all the facts and therefrom decided the issues there presented and it was error not to do so.

CONCLUSION.

In conclusion, the appellant claims that the court was in error and the judgment should be reversed and remanded with instructions to determine the damages and enter judgment for the appellant.

Appellant believes that the court clearly misconstrued the pertinent statutes and was in error; that the judgment is opposed to and contrary to not only the law but the evidence and further the court was in error in its construction of the deed to appellant.

That the court was precluded by the statute and in error in giving any consideration to the contentions of adverse possession.

Therefore, the appellant concludes that it has been demonstrated and the record clearly shows that the judgment should be reversed and judgment for possession and damages entered for the appellant.

Dated, Agana, unincorporated territory of Guam.
25 March 1955.

Respectfully submitted,

FINTON J. PHELAN, JR.,
Attorney for Appellant.

